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Eng'd by H. B. Hall, Jr.

*Don't do*  
*L. S. Black*  
*L. S. Black*

Signature of L. S. Black, when copied to right hand in 1868.

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ESSAYS  
AND  
SPEECHES  
OF  
JEREMIAH S. BLACK.

*WITH A BIOGRAPHICAL SKETCH.*

BY  
CHAUNCEY F. BLACK.

NEW YORK:  
D. APPLETON AND COMPANY,  
1, 3, AND 5 BOND STREET.  
1885.

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## COMPILER'S NOTE.

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THE speeches and essays comprised in this book are selections from the most important productions of the author. It has not been without difficulty that some of them were recovered for the purpose. When Judge Black had uttered a speech, or written an essay, he concerned himself no more about it, but left it to find what entertainment it could in the world. He preserved little, and the compiler is indebted to friends in various parts of the country for copies of some of the most famous papers in this volume. He is under obligations peculiarly heavy to Hon. Levi Maish, of York, Pennsylvania, for favors of this kind.

The open letters to Vice-President Wilson on the character of Edwin M. Stanton, the letter to Mr. Adams on the character of William H. Seward, and the article entitled "A Great Lawsuit and a Field Fight," are taken from the "Galaxy" magazine. The replies to Mr. Ingersoll, Mr. Boutwell, and Mr. Howe, and the article entitled "The Great Fraud," are copied from the "North American Review," in which they originally appeared.

The compiler regrets that he is unable to present the great speech in the McCardle case. The original report of this speech was so defective that Judge Black repudiated it altogether, and had dictated about two thirds of a revised report, when the work was suspended and never resumed. It would be obviously unfair to offer the reader either the discarded newspaper report, or the incomplete revise, and so the speech has been wholly omitted, great and celebrated as it was.

Except in one instance, the compiler has not encumbered the following pages with notes of any description. It will be found that each speech and essay will itself contain a sufficient explanation of the circumstances under which it was spoken or written.

There has been for many years a steadily increasing demand for the republication of these papers in some appropriate and permanent form ; and if this volume shall meet the wants of the many persons whose individual requests for separate copies the family and friends of Judge Black have been unable to honor, the object of the compiler will have been accomplished.

CHAUNCEY F. BLACK.

BROCKIE, *January, 1885.*

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## BIOGRAPHICAL SKETCH.

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"O good gray head, which all men knew ;  
O iron nerve, to true occasion true ;  
O fallen at length, that tower of strength,  
Which stood four-square to every wind that blew !"

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THIS sketch will give the reader little more than an outline of the life of Judge Black. If it puts him in possession of a few dates, and the real nature of a few important transactions in which he took part, together with a very limited conception of his general work and personal character, the modest purpose of the writer will have been attained. Out of the rich and abundant materials which remain, it is believed that an extremely useful and interesting book of biography may, at a later period, be made. But it will require much time to collect, arrange, and illustrate the records of a life so busy and the various produce of a pen so active as his. Nothing can, therefore, be said of it at present, except that it will in the proper season be conscientiously done, though in other respects it will doubtless be wholly unworthy of the subject.

JEREMIAH SULLIVAN BLACK was born at his father's homestead, a place called Pleasant Glades, in Stony Creek Township, Somerset County, Pennsylvania, January 10, 1810. It is situated on the Bedford turnpike, seven miles from Somerset, the county town, in the lofty basin between the main range of the Alleghanies and the Laurel Ridge, two thousand feet above the level of the sea.\* There are the

\* "It is not a valley quite, nor basin, but is slightly curved or cupped from crest to crest of the twin highlands, where they interlock and lift the intervalle almost to a level with their summits."—Dr. WILLIAM ELDER, in "*General Ogle*," "*Periscopes*," p. 15.

graves of his ancestors,\* for two generations, in a picturesque burial-ground, visible from the famous thoroughfare, once thronged with flying stages and great canvas-covered freight-wagons, but now almost as desolate as the loneliest glens of the neighboring mountain.

His grandfather, James Black, had been a man of considerable landed property and some consequence in that community. He was a farmer, a justice of the peace, and a local public character of more than ordinary influence. His father, Henry Black, heir to the homestead, was justice of the peace, associate judge of the county for twenty years, member of the General Assembly, and representative in Congress. He died in 1841—the year before his son was appointed president judge of the courts in which he himself had so long sat as an associate—widely regretted by the public whom he had served honorably at a time when public employment implied public confidence.

The lad went to the schools of the neighborhood—of which his conversation through life was full of racy anecdotes—in the country, at the villages of Stoystown, Berlin, and Somerset, and finally to a classical school at Brownsville, Fayette County, where his education at the hands of regular masters came to an end. Thenceforth he governed his own studies, but he governed them with a sober judgment, though he pursued them with a keen spirit. Mental labor was almost no labor to him. On one occasion, when his father was taking leave of his family upon the eve of his departure for some distant place, he asked each person in turn what he should bring him or her from the great town. Young Jere was slow to answer, as if his re-

\* Judge Black's ancestors were Scotch-Irish and German. The Blacks of that ilk came from Ireland, and settled in that part of York County which has since been set apart to Adams, where James Black, grandfather of Judge Black, married Jane McDonough.

Judge Black's mother was Mary Sullivan, born at York, August 16, 1780. Her father, Patrick Sullivan, was born in Ireland on St. Patrick's day, 1754, came to this country at fifteen years of age, served as a captain in the War of Independence, and, coming to York on some military duty, married Barbara Bowser, a person of pure German blood. They removed to Elk Lick Township, Somerset County, where Captain Sullivan had a comfortable estate in lands, called in the patent "Rural Felicity." He was a stern Federalist, was rather conspicuous in local politics, and for some years represented that district in the Legislature. As a child Judge Black spent much time with these grandparents at "Rural Felicity," which, although he never owned a foot of it, and it has long since passed out of the family, is now most frequently described as the "Judge Black farm."



quest was almost too great a one to be preferred, but finally said, "Father, I wish you would bring me Shakespeare's plays." "Ah, Jere," said the father, "I fear you have had plays enough. Hadn't I better bring you some *works*?" This reply was not intended as a rebuke to the boy for any supposed aversion to manual labor, but was merely a witty expression of his own opinion of the ease and pleasure with which the young student had mastered the books he already had.

The boy was especially fond of the Latin classics, and at fifteen or thereabout was a clever Horatian. He had committed the text *verbatim*; had translated it into English prose; and had then turned the whole into English verse of his own. To the day of his death he remembered literally all three—the Latin, the English prose, and the English verse—though neither had ever been written; and he amused many a leisure moment by comparing his childish version with the numerous published translations of his favorite. This, however, was, as his father intimated, but the play of a still undisciplined but extraordinarily vigorous intellect. He pursued with even greater assiduity the studies for which he had less taste, and in which he then felt the greatest dread of finding himself deficient when he should come to that man's work of making an honest living, which he knew, from his father's circumstances, he must soon take up. He subjected every learned man, priest or layman, who came his way, to a catechism of his own devising, and thus cleared up the doubts and difficulties which occasionally arose in the course of his self-guided studies. It is not, therefore, surprising that when, at the age of seventeen, he rode to the county town on horseback, with his father, and was entered a student of law in the office of Chauncey Forward, he was found a fair scholar, well equipped for the profession. But, as the Shakespeare incident above goes to show, his attention had not been confined to school-books. His serious mind, with its mighty and eager grasp, seized and assimilated everything within reach. He had read every book in his father's house—and that was a store by no means inconsiderable for the time and place—and also every one that could be fished from the shelves and closets of the better furnished house of his grandfather, Patrick Sullivan, in Elk Lick Township, where in childhood and boyhood he had frequently spent many weeks at a time. While a student at Somerset he acquired French enough to read and write it with some facility, from a Frenchman who taught

in that and the neighboring counties, as he happened to be favored with a class.\*

Mr. Forward † was then in the prime of his life, and was highly distinguished both at the bar and in public life. He was the unquestioned leader of the Democratic party, as Mr. Charles Ogle was of the Whig or Anti-Masonic party. The student was deeply impressed by the remarkable qualities of these great men, and became profoundly interested in the political questions over which they contended. He soon contributed his share to the discussion in the form of articles in the local newspapers, which attracted attention, and first revealed to Mr. Forward the fact that his somewhat rustic-appearing student from Stony Creek was a person to be respectfully considered. Although Judge Black, the elder, was a Whig, his son became a Democrat, and, from that good hour to his last on earth, defended with all the fervor of strong conviction and passionate attachment the principles he then intelligently espoused.

The student was at first somewhat staggered by the mass of learning pertaining to the science he had undertaken to acquire, and he shrank modestly from what appeared to him an almost impossible labor. But when he had mastered a few governing principles, everything fell into order in his orderly mind, and the rapidity of his mental conquests in this new domain were most astonishing, and particularly so to himself. Mr. Forward was more than gratified. His student had not only excited his admiration, but had won his respect and confidence in such measure that he brought him to the bar before he was of age, and, having himself been elected to Congress, immediately "advertised" his large business into the hands of young Mr. Black. The latter was soon after appointed Deputy Attorney-General for the county of Somerset, and found himself on one side or the other of every case in the several courts. His fame and practice extended rapidly, and rested upon the sure foundation, not of genius merely, or of the capacity for oratorical display, but of personal probity, conscientious devotion to the interests of clients, and that comprehensive and scientific knowledge of the law which, in the consider-

\* After he became Attorney-General, he learned enough Spanish to enable him to understand and expound, though not critically, the Spanish and Mexican laws and legal documents relating to California land-grants.

† Jeremiah S. Black and Mary Forward, eldest daughter of Chauncey Forward, were married March 23, 1836. She survives him.



ate judgment of his professional brethren, gives him historical rank beside the illustrious Gibson.\* When, therefore, Mr. Forward returned to the bar, he encountered Mr. Black, among others, at the head of it. He continued to practice, with success, in Somerset, Cambria, Bedford, and Blair, until 1842, when, at thirty-two years of age, he was appointed President Judge of the Sixteenth Judicial District.†

Judge Black while at the bar had not been much of a politician. He had given his mind to literature and law, and if he was profound in learning he was also masterly in exposition. He was not fond of the stump. He had no taste, as he always insisted he had no talent, for that kind of speaking. But he was a vigorous writer on political subjects, and his pen was much in the service of his party. He did also occasionally overcome his repugnance to popular exhortations, and address political meetings in the counties in which he practiced, when he invariably raised his reputation by the clearness, solidity, and dignity of his arguments, confined to the principles in dispute, and relieved only by some bit of quaint humor or curious illustration out of some unfamiliar book. As already said, however, he was a Democrat of the straitest sect, a disciple of Jefferson, and a most unflinching and aggressive friend of Jackson. It is not surprising that such a man should have been greatly aroused by the fierce and bitter struggle which resulted in the election of

\* "When I came here in 1838 there were five gentlemen, practicing members of the bar, all of whom have since made their marks upon the history of the country. . . . They were Chauncey Forward, Charles Ogle, Moses Hampton, Joshua F. Cox, and Jeremiah S. Black. I name them in the order in which they were admitted to this bar, and not with any view of preference for either or any of them, for, if I did, I certainly would not name Judge Black last, for as a lawyer he attained higher honors than any of them. Chauncey Forward was a great lawyer, a man 'cunning of fence,' and a wily antagonist; so was Ogle; so was Hampton; Cox was a combative man; but Judge Black devoted himself to the acquisition of a scientific knowledge of the law. He studied it as a science, more than any of them, and as such a lawyer he rose to the acknowledged head of the American bar."—Hon. JOHN R. EDIE, *Address at the Somerset Bar Meeting*.

† He succeeded the Hon. Alexander Thomson, for whose character as a man and a judge he entertained the most profound reverence. Shortly before his death he declared to the writer his resolution to put in some appropriate form, for the benefit of posterity, his high estimate of Judge Thomson. The latter presided in the courts of the district from 1831 to 1842. He was the father of Frank Thomson, Esq., Vice-President of the Pennsylvania Railroad Company, and of Dr. William Thomson, of Philadelphia.



David R. Porter in 1838. He entered into that contest with pen and voice, and they were a pen and a voice which told all the more because they were not hackneyed. This circumstance may have been remembered when the Governor, unable to make a satisfactory selection among the contending candidates for judge, selected him as the safest deliverance from a troublesome and politically dangerous contention. His judicial conduct speedily vindicated the choice of the Governor, and carried the fame of the young judge far beyond the confines of his long, mountain district, which he loved to ride on the back of the most spirited horse he could find. With the exception of an address delivered at Bedford on the death of General Jackson, and an address entitled "Patriotism" before the literary societies of Washington College, Judge Black, during this period of ten years, confined himself strictly to the duties of the bench. But he was recognized—notably so after the Jackson address—as one of the foremost men in the State on the Democratic side, and was more or less discussed as a candidate for Governor, for Senator in Congress, and for Judge of the Supreme Court.

In 1851 a full bench of justices of the Supreme Court of Pennsylvania was chosen under the constitutional amendment of 1850 making the judiciary elective. Judge Black was nominated by the Democratic State Convention, and, receiving a larger number of votes than any candidate on the ticket, was elected, with Gibson, Lewis, Lowrie, and Coulter. All of these were Democrats except Coulter, and all of them were men who adorned the bench to which they were then elevated. In the lottery which determined the matter for that first bench of judges chosen by the people at the polls, Judge Black drew the short term and became Chief-Justice. In 1854, his term as Chief-Justice having expired, he was elected an Associate Justice by a very large majority, although the head of his ticket, the Democratic candidate for Governor, was defeated. Of the work of the court, of his numerous opinions from fourth Harris to fifth Casey, and of the deep impression he left upon the jurisprudence of the State, this hasty sketch is not the place to speak.\*

\* He studied law, and soon became a judge, and, until he made his appearance in this city as a Cabinet minister in 1857, his attainments and abilities were mainly exhibited in high judicial stations. For fifteen years he administered justice according to law in his native State of Pennsylvania, and in the reports of his opinions in cases decided during that period will be found splendid and abundant evidence of his enlightened

Mr. Buchanan's election to the presidency in 1856 was an event of great moment to the politicians of his native State. Judge Black had, from the time Mr. Buchanan was first seriously named for that great place, earnestly favored his pretensions, but he was able to assist in his elevation only by the quiet personal influence of a judge removed from partisan politics. He had no claims upon the President-elect. He knew that his name had been under consideration for a place in the Cabinet, but he supposed it had been finally dismissed, and he had taken passage for a brief vacation in Europe, when—again as a compromise between contending factions—he was, on the 7th

wisdom, his learning in the law, his lofty and sound morality, all conveyed with a felicity of language and eloquence of expression that may even here in this court-room be declared to be unsurpassed.

When in 1852 he pronounced from the Supreme Bench of Pennsylvania that masterly eulogium upon the illustrious Gibson, how many then felt and how many more feel now that he was unconsciously describing his own marvelous gifts and admirable qualities!—Senator BAYARD, of *Delaware*.

It has been said, in reproach of Pennsylvania, that her two greatest citizens were Albert Gallatin, of Switzerland, and Benjamin Franklin, of Massachusetts. But in a comparison of jurists the Commonwealth of Pennsylvania can boastfully point to Gibson and Black, and ask the entire nation to produce their peers. I do not propose to analyze Judge Black's judicial character, nor to present a catalogue of his legal opinions. Every English-speaking lawyer knows how much he has contributed to the purity and power and nobleness of our jurisprudence. He has erected his own immortal monument, and in every forum is his cenotaph cherished and honored by the profession he loved and adorned.—Hon. JAMES H. HOPKINS, of *Pennsylvania*.

To this generous store of knowledge he added fluency of speech, both in public address and private conversation, and a style of writing which was at once unique, powerful, and attractive. He had attained unto every excellence of mental discipline described by Lord Bacon. Reading had made him a full man, talking a ready man, writing an exact man. The judicial literature of the English tongue may be searched in vain for finer models than are found in the opinions of Judge Black when he sat, and was worthy to sit, as the associate of John Bannister Gibson on the Supreme Bench of Pennsylvania.—“*Twenty Years of Congress*,” by JAMES G. BLAINE.

To the expression by Judge Black respecting Gibson—“The State can have no better thing to be proud of than such a character; in all her store she has no richer jewel to display than the fame of such a son”—we can add, she has now another jewel equally rich, and she displays them together with equal pride. It would be a most acceptable service to the profession were such an essay as that on Gibson by Porter prepared respecting Black, devoted mainly to his work upon the bench and at the bar. It would be a fitting accompaniment, and the two should be bound together and placed in every law library of the State.—T. J. KEENAN, Esq., *Pittsburg, Pennsylvania*.



of March, 1857, unexpectedly summoned to the post of Attorney-General.

Although that was a Cabinet as completely dominated by the personality of the President as any in the previous history of the country, not excepting Jefferson's and hardly excepting Jackson's, Judge Black at once became a conspicuous figure. His influence with the President, derived, not as has been generally supposed from close personal relations in private life, but from pure force of the intellect and character of the Attorney-General, soon became very great, and remained, perhaps, stronger than that of any other member to the end. The heads of the other departments signified their confidence in the Attorney-General by the number of opinions they required from him, and the nature of the business they referred to him.

But the most extraordinary draft upon the office during his incumbency was the management of that class of cases, monstrous alike in their number, magnitude, and character, known as "California land claims." After the conquest, alleged Mexican grants were presented to the Board of Land Commissioners covering 19,148 square miles! Nearly all of them were confirmed by the board before the system of fraud had been discovered or even suspected. Most of them passed securely through the United States District Court, but were finally exposed and defeated in the Supreme Court. The value of the property, public and private, covered by these forged titles was estimated at \$150,000,000. The best part of San Francisco was involved in no less than five fraudulent claims; and Sacramento, Stockton, Marysville, and Petaluma were all claimed under false grants, forged after the American occupation. Almost every site upon which the United States subsequently erected its public buildings, forts, and arsenals, was similarly assailed. But the Attorney-General organized a system of thorough investigation; the methods of the forgers were ascertained; a table of professional perjurers was constructed; and one after another the forged claims were stricken down. The amount of property thus saved to the United States and to innocent settlers and purchasers aggregated hundreds of millions of dollars. It was the most tremendous professional labor and the most complete professional success on record in this or any country. It occupied the three and a half years of Judge Black's term as Attorney-General, and, if it earned him the enduring hostility of the many and powerful conspirators, baffled by his firmness and vigilance, it was one of the most honora-

ble and, to himself, one of the most satisfactory of his many public services.

The last months of Mr. Buchanan's administration constitute the most important period of equal length in American history, the first months of Mr. Lincoln's not excepted. It has hitherto been explored mainly for materials upon which to accuse and malign the party then in power. It has been covered by only two books with any sort of pretensions to historical accuracy or historical candor.\* This compiler proposes to deal with it fully and fairly in a future publication. For the present the following summary (but, as far as it goes, authentic) narrative will serve to show Judge Black's relations to those momentous events which immediately preceded the actual opening of the great civil war.†

"The executive administration was still nominally in the hands of the Democrats; but the power of the President was limited by law, and his moral influence had ceased with the rout of his party. In the most pressing exigency of the nation's history, he could not get a collector of customs at the port of Charleston confirmed by the Senate, although it seemed perfectly clear then that the initial struggle for the Union would take place in that harbor. All eyes were turned toward the rising sun. Mr. Lincoln's policy was as yet a profound mystery. It was not until he began his journey to Washington that he let fall any intimations which might help the country to a conclusion concerning his opinions. But when he did speak he left no room for doubt. It was clear that he thought a peaceful solution of the difficulties not only possible but supremely desirable; and the employment of force, or even the suggestion of it, by his predecessor in office would disconcert his plans and disappoint his hopes. To the same purpose spoke the principal newspaper organ of his party at New York, and the principal organ of his Secretary of State at Albany. There was nothing to indicate that he would pursue a more warlike policy than Mr. Buchanan, or that he desired his partisans in Congress to arm the President with the powers which Mr. Buchanan implored them to give him.

"When Congress met, on the 3d of December, it confirmed by its conduct the existing impression. It acted upon none of the Presi-

\* "Buchanan's Defense," and Curtis's "Life of James Buchanan."

† From a paper prepared and published by the compiler in 1874.



dent's recommendations, and smothered indiscriminately every measure that looked either to coercion or defense. Mr. Howard's bill to call out the militia, Mr. Stanton's bill for the protection and recovery of the forts, and the bill to provide for the collection of duties, were all alike impartially killed and buried. Nor can the omission be charged to the account of oversight. It was a deliberate refusal, upon full information, to give the President the power required to meet the rebellion. It was universally admitted that he had no authority under the act of 1795 to call out the militia. It was never intimated that he could of his own will increase the regular army or navy, or that he might execute the laws by military force, without the intervention of judges and marshals. And if he had hinted his intention to usurp these powers, or any others which did not legally belong to him, there is no reason to doubt that he would have been impeached within twenty-four hours.

"It will be seen as the history develops that Mr. Buchanan, acting under the paramount influence of General Scott and Major Anderson, was betrayed into some grave errors with regard to Sumter; but as to the constitutional right of the Government to reduce a revolt of any size or kind, his opinions were thoroughly orthodox, and shared by nine tenths of his countrymen. The Union, he held, was necessarily perpetual. No State could lawfully withdraw or be lawfully expelled from it. The Federal Constitution was as much a part of the 'Constitution of every State as if it had been textually inserted therein.' The Federal Government was sovereign within its own sphere, and 'acted directly upon the individual citizens of every State.' Within these limits its coercive power was ample to defend itself, its laws, and its property. It could suppress insurrections, fight battles, conquer armies, disperse hostile combinations, and punish any or all of its enemies. It could meet, repel, and subdue all those who rose against it; but it could not obliterate a single Commonwealth from the map of the Union, or declare indiscriminate war against all the inhabitants of a section, confounding the innocent with the guilty, and rushing down in one mighty havoc upon friend and foe alike. Such was the opinion of the Attorney-General, and we shall presently see how that officer interpreted his own doctrines as the conflict deepened and new exigencies arose. The President adopted these views and embodied them in his annual message, but warned Congress that if the rising insurrection was to be met by force, the law as it stood

was fatally defective. The acts of 1795 and 1807 were wholly inadequate to the present occasion. They required the President to act in concert with the marshal and a civil *posse comitatus*; but in this case—in South Carolina—the marshal, the judges, all the public officers, and all the people were on one side, and that the wrong one. With Congress rested the whole responsibility of peace or war, and with Congress the message left it.

“The original draft of this message had received the approval of every member of the Cabinet except Mr. Cobb, Mr. Thompson, and Mr. Cass. The two former, of course, objected strongly to that part of it which denied the right of secession. Mr. Cass impressively demanded that the right of Congress to make war against a State should be denied in more forcible terms than the President had used. It was so modified solely to meet his views; but the venerable Secretary was so deeply affected by the prospect of a bloody collision between the States that he expressed his feelings in a burst of tears. Mr. Floyd was loud and vehement on the side of the Union, and went as far as the farthest in support of the President's views.

“On the 28th of December three gentlemen, styling themselves ‘Commissioners of South Carolina,’ sent a communication to the President offering to exhibit their credentials and proposing to treat with ‘the Government of the United States’ about sundry questions of debt and property. But after their departure from home the whole aspect of affairs had been changed by an important event. Major Anderson, the Federal commander in Charleston Harbor, had in pursuance of a plain order removed his little force from Fort Moultrie to Fort Sumter, and the commissioners threatened to ‘suspend all discussion’ while in the very act of opening it until Major Anderson's proceedings should be satisfactorily explained.

“Since the meeting of Congress the President's Cabinet had been materially changed. Mr. Cobb and Mr. Cass had gone out, the former because he disapproved the annual message, and the latter because the force in Charleston Harbor had not been increased. The vacancies were filled by the appointment of the Attorney-General, Jeremiah S. Black, Secretary of State; of Edwin M. Stanton, Attorney-General; and Philip F. Thomas, of Maryland, Secretary of the Treasury. Mr. Thompson's retirement from the Interior was simply a question of time.

“From the evening of the 27th to the morning of the 31st—three



days and four nights—the removal of Anderson and the answer to the commissioners were under discussion. The commissioners had arrived on the 26th, and news of Anderson's removal was received on the morning of the 27th. That morning, when the Cabinet assembled and the startling news from Charleston was announced, the Secretary of State expressed his strong approbation of Anderson's movement, and asserted that it was in perfect accordance with his orders. It happened that nobody else recollected the precise terms of those orders; the Secretary of War denied that they contained anything which could justify the removal, and the President was inclined to agree with him upon the question of fact. The orders were sent for and read, and it was found that the instructions were explicit and clear to remove into any fort in the harbor which would increase Major Anderson's means of resistance, as soon as he had 'tangible evidence of a design to attack' him. Some discussion on the tangibility of the evidence ensued, but this was soon settled, for the words could mean nothing unless they meant that he should move whenever he had a well-grounded apprehension that an assault would be made, and he was left to judge of that for himself. The President could not choose but support the officer who had in apparent good faith obeyed the instructions upon which he was bound to act. Mr. Floyd then insisted with much earnestness that the troops should be entirely withdrawn from all the forts in Charleston Harbor, and he put his proposition in writing, but it received no support from any of his colleagues and no countenance from the President. The President thought, as he afterward said, that the tone in which Mr. Floyd read the paper was loud and discourteous, but at the time he rebuked it only with that quiet dignity under which the courage of many a stronger man had wilted before.

"Mr. Floyd's views or wishes on this or any subject had for some time before ceased to have the slightest influence on the minds of the President and the other members of the Administration. He was bold, brilliant, and true-hearted to his friends, but his political principles hung loosely upon him, and he was entirely incapable of managing pecuniary affairs. His private business was always in confusion, and that of the War Department was soon brought to a similar condition. His colleagues bore his shortcomings impatiently, and the President was vexed and distressed with complaints of maladministration. Mr. Buchanan's wrath was thoroughly aroused when he

heard of the Secretary's assent to the payment of a large claim in the face of the Attorney-General's opinion that it was unjust and illegal. By his stern command the money was stopped before it reached the hands of the claimant. When he discovered that Mr. Floyd had accepted heavy bills drawn by contractors long in advance of their earnings, he sent the Vice-President, Mr. Breckinridge, to him with a request that he would resign, couched in terms which made him clearly understand that he would be removed if he did not.

"This happened on the 23d of December, and from that time Mr. Floyd was regarded as virtually out of office. Until then he was an outspoken opponent of secession, and when he came uninvited to the Cabinet meetings of the 27th and took the side of the secessionists on the question under discussion, it was plainly seen that his object was to make an issue on which he could resign, without reference to the real cause. He did, in fact, resign immediately afterward, and gave as a reason the difference between him and the President about the treatment of South Carolina. It was a cunning and well-managed manoeuvre, and some of his colleagues, who liked him personally, were willing to see it succeed. The President was induced with some difficulty to accept the resignation without commentary, but three days later a criminal prosecution was ordered against him for malversation in office and a conspiracy to defraud the United States, based on his transactions with the contractors already referred to. An indictment was found, but it was never tried, because he had testified on the whole subject before a committee of the House of Representatives, and there was an act of Congress which forbade that any person should be 'held to answer criminally in any court of justice for any act or fact' concerning which he had so testified. It is impossible to say what would have been the result of a trial. There is no evidence against him of anything worse than reckless imprudence; not a cent from any money proceeding from these premature acceptances could be traced to his hands; and it is very clear that he had no connection whatever, in thought, word, or deed, with the abstraction of the Indian trust bonds from the Interior Department. He left Washington empty-handed—so poor that he had to borrow the money which paid the expenses of taking his family to Virginia.

"Late in the evening of Saturday, the 29th of December, the President laid before the Cabinet the result of his own reflections in the form of an answer to the South Carolina commissioners. It was such



a paper as none of them expected to see. One member only approved the document and five opposed it, but opposed it for different reasons. Messrs. Black, Holt, and Stanton objected that it conceded too much to the contumacious State; and Messrs. Thomas and Thompson thought its whole tone was so hostile to the claim of South Carolina that it would make the immediate outbreak of civil war inevitable. Mr. Toucey was fully with the President. Not much criticism was bestowed on the document at the time. The members all thought that further discussion would be useless; in their past experience they had seen how inflexible were Mr. Buchanan's resolutions when once formed. Each was left to decide for himself what his duty required him to do. It seemed certain that the Cabinet was about to explode and fly off in opposite directions.

"On the next morning, Sunday, the 30th, Mr. Black communicated to Messrs. Stanton, Holt, and Toucey his conviction that the President's mind was fixed beyond all hope of change, and his own determination to resign in consequence. Mr. Toucey told the President, and Mr. Black was sent for. He went reluctantly, dreading the effect upon his own feelings of the appeal which he knew Mr. Buchanan would make to the sacred friendship which had lasted through so many years of prosperity, and which certainly ought not to be broken in that hour of trouble and adversity. What was said between them during that interview need not be told, but it ended in the offer of the President to let Mr. Black take the document in question, strike out what he thought objectionable, and insert what was necessary to make it meet his own views; but this must be done immediately. Mr. Black went to the Attorney-General's office, and there wrote the following paper, which Mr. Stanton copied as rapidly as the sheets were thrown to him:

*"Memorandum for the President on the subject of the paper drawn up by him in reply to the Commissioners of South Carolina.*

"1. The first and the concluding paragraph both seem to acknowledge the right of South Carolina to be represented near this Government by diplomatic officers. That implies that she is an independent nation, with no other relations to the Government of the Union than any other foreign power. If such be the fact, then she has acquired all the rights, powers, and responsibilities of a separate government by the mere ordinance of secession which passed her convention a few days ago. But the President has always, and particularly in his late

message to Congress, denied the right of secession, and asserted that no State could throw off her Federal obligations in that way. Moreover, the President has also very distinctly declared that even if a State could secede and go out of the Union at pleasure, whether by revolution or in the exercise of a constitutional right, he could not recognize her independence without being guilty of usurpation. I think, therefore, that every word and sentence which implies that South Carolina is in an attitude which enables the President to "treat" or negotiate with her, or to receive her commissioners in the character of diplomatic ministers or agents, ought to be stricken out and an explicit declaration substituted, which would reassert the principles of the message. It is surely not enough that the words of the message be transcribed if the doctrine there announced be practically abandoned by carrying on a negotiation.

"2. I would strike out all expressions of regret that the commissioners are unwilling to proceed with the negotiations, since it is very clear that there can be no negotiation with them, whether they are willing or not.

"3. Above all things, it is objectionable to intimate a willingness to negotiate with the State of South Carolina about the possession of a military post which belongs to the United States, or to propose any adjustment of the subject or any arrangement about it. The forts in Charleston Harbor belong to this Government—are its own, and can not be given up. It is true they might be surrendered to a superior force, whether that force be in the service of a seceding State or a foreign nation. But Fort Sumter is impregnable and can not be taken if defended as it should be. It is a thing of the last importance that it should be maintained if all the power of this nation can do it; for the command of the harbor and the President's ability to execute the revenue laws may depend on it.

"4. The words "coercing a State by force of arms to remain in the confederacy—a power which I do not believe the Constitution has conferred on Congress," ought certainly not be retained. They are too vague, and might have the effect (which I am sure the President does not intend) to mislead the commissioners concerning his sentiments. The power to defend the public property—to resist an assailing force which unlawfully attempts to drive out the troops of the United States from one of the fortifications, and to use military and naval forces for the purpose of aiding the proper officers of the United States in the execution of the laws—this, as far as it goes, is *coercion*, and may very well be called "coercing a State by force of arms to remain in the Union." The President has always asserted his right of coercion to that extent. He merely denies the right of Congress to make offensive war upon a State of the Union as such might be made upon a foreign government.



“ ‘5. The implied assent of the President to the accusation which the commissioners make of a compact with South Carolina by which he was bound not to take whatever measures he saw fit for the defense of the forts, ought to be stricken out, and a flat denial of any such bargain, pledge, or agreement inserted. The paper signed by the late members of Congress from South Carolina does not bear any such construction, and this, as I understand, is the only transaction between South Carolina and him which bears upon the subject either directly or indirectly. I think it deeply concerns the President's reputation that he should contradict this statement, since if it be denied it puts him in the attitude of an executive officer who voluntarily disarms himself of the power to perform his duty, and ties up his hands so that he can not, without breaking his word, “preserve, protect, and defend the Constitution, and see the laws faithfully executed.” The fact that he pledged himself in any such way can not be true. The commissioners, no doubt, have been so informed. But there must be some mistake about it. It arose, doubtless, out of the President's anxious and laudable desire to avoid civil war, and his often-expressed determination not even to furnish an excuse for an outbreak at Charleston by re-enforcing Major Anderson unless it was absolutely necessary.

“ ‘6. The remotest expression of a doubt about Major Anderson's perfect propriety of behavior should be carefully avoided. He is not merely a gallant and meritorious officer who is entitled to a fair hearing before he is condemned. He has saved the country, I solemnly believe, when its day was darkest and its perils most extreme. He has done everything that mortal man could do to repair the fatal error which the Administration have committed in not sending down troops enough to hold *all* the forts. He has kept the strongest one. He still commands the harbor. We may still execute the laws if we try. Besides, there is nothing in the orders which were sent to him by the War Department which is in the slightest degree contravened by his act of throwing his command into Fort Sumter. Even if those orders sent without your knowledge did forbid him to leave a place where his men might have perished, and shelter them under a stronger position, we ought all of us to rejoice that he broke such orders.

“ ‘7. The idea that a wrong was committed against South Carolina by moving from Fort Moultrie to Fort Sumter ought to be repelled as firmly as may be consistent with a proper respect for the high character of the gentlemen who compose the South Carolina Commission. It is a strange assumption of right on the part of that State to say that our United States troops must remain in the weakest position they can find in the harbor. It is not a menace of South Carolina or of Charleston, or any menace at all. It is simple self-defense. If South Carolina does not attack Major Anderson, no human being will be injured ; for there certainly can be no reason to believe that he will

commence hostilities. The apparent objection to his being in Fort Sumter is that he will be less likely to fall an easy prey to his assailants.

“These are the points on which I would advise that the paper be amended. I am aware that they are too radical to permit much hope of their adoption. If they are adopted the whole paper will need to be recast. But there is one thing not to be overlooked in this terrible crisis. I entreat the President to order the Brooklyn and the Macedonian to Charleston without the least delay, and in the mean time send a trusty messenger to Major Anderson to let him know that his Government will not desert him. The re-enforcement of troops from New York or Old Point Comfort should follow immediately. If this be done at once all may yet be not well, but comparatively safe. If not, I can see nothing before us but disaster and ruin to the country.’

“The original of this paper went to the President, but Mr. Stanton’s copy was retained by him and by him indorsed ‘Observations on Correspondence, President S. C. Com., by J. S. B.’ Although Judge Black took the entire responsibility of it, indited every word of it himself, and spoke throughout in the first person singular, it undoubtedly embodies the sentiments of Mr. Stanton also. He commented upon it with strong expressions of delight, and Mr. Holt, who saw it the same day, equally approved it. Mr. Stanton would have resigned with Mr. Black if the views of the latter (which were also his own) had not been adopted; Mr. Holt, perhaps, would have done the same, but he did not say so. There never was any talk or suggestion or threat, absolute or conditional, of resignation by any Northern member of the Administration other than what is here stated. After the transfer of Mr. Holt to the War Department, and the resignation of Messrs. Thomas and Thompson, the Cabinet consisted of Messrs. Black, Dix, Holt, Toucey, Stanton, and King. They continued in perfect harmony with each other until the end. If any exception to this statement be required, it must be made with reference to the arrangement which took place about Fort Pickens. General Scott urgently recommended this ‘truce,’ as he afterward called it. Mr. Holt and Mr. Toucey gave it their approbation, and Messrs. Black and Stanton opposed it; the other members gave no opinion. The President thought the General-in-Chief was manifestly right, but there was very little discussion about it. On the general principles which controlled them, and on the details of business, they were in perfect accord.



“The ‘Observations’ were the last effort in the single-handed struggle of one man to alter a decision which had stood immovable against the united assault of himself and two of his colleagues. Unexpectedly it succeeded. The President yielded to this earnest appeal much that he had previously denied with inflexible firmness—how much the reader may ascertain by a comparison of this paper with the final answer to the commissioners. Mr. Buchanan had always felt in full the deep responsibility which rested upon him. He was anxious to avoid a collision which would prevent accommodation, hurry the border States out of the Union, and precipitate a civil war for which the Government was totally unprepared. But he had never for a moment willingly contemplated the surrender of the forts at Charleston. On the contrary, he had uniformly declared, before the election and after, that if those forts should be given up he would ‘rather die than live.’

“On the 3d of March, 1861, the Thirty-ninth Congress reached the prescribed period of its existence and died a constitutional death. Its last session of three months was spent in full view of an awful public calamity, which it made no effort to avert or to mitigate. It saw the nation compassed round with a frightful danger, but it proposed no plan either of conciliation or defense. It adjourned forever, and left the law precisely as it found it.

“Thus the Executive had been left to struggle alone against a revolution which the constitutional powers of both the Legislature and the Executive would probably have been insufficient to check. He was almost powerless, but none the less resolved to put forth the little strength he had. He was solemnly assured by the highest authority that South Carolina would not attack any of the forts in Charleston Harbor in the circumstances which then existed. But, ‘to guard against surprise,’ an expedition as powerful as his limited means would afford ‘was prepared early in December and held in readiness to re-enforce Anderson, and an officer was dispatched to acquaint him with the fact and order him to defend himself to the last extremity.’

“For nearly a month the man-of-war Brooklyn lay at Fortress Monroe awaiting the proper moment to take on board three hundred disciplined troops, with provisions and munitions of war, to be thrown into Fort Moultrie. At one time it appears the Secretary of War (Floyd) was urgent for sending her off immediately, but was met by a professional opinion from General Scott that she ought not to go

at all. But on the 30th the President made up his mind to succor Anderson at all hazards. The latter had now removed to Sumter, the South Carolinians had seized all the unoccupied forts, and there was no longer any reason for delay. But again General Scott interposed. He did not wish the great steamer with the three hundred veterans to be sent from Fortress Monroe, but recommended instead a sloop-of-war and cutter with two hundred and fifty raw recruits from New York. The President promptly overruled him, and directed the Secretaries of War and Navy to dispatch the Brooklyn. The necessary orders were issued through General Scott, who, instead of transmitting them to the proper officers, put them into his pocket, and called to 'congratulate' the President on the fact that he had them there. But on that day (December 31st) the President had communicated his answer to the South Carolina commissioners, and before they separated both he and the general came to the conclusion that the order to the Brooklyn ought to await the reply of the commissioners. By the courtly soldier this was considered only 'gentlemanly and proper.'

"The delay for this purpose lasted until the 2d of January, when it was discovered that the general, who had acquiesced in the plan of sending the Brooklyn, had changed his mind again, and would now hear to nothing else but a merchant-vessel and the recruits from New York. With great reluctance the President yielded, and the unarmed *Star of the West* was substituted for the armed and powerful Brooklyn. She sailed on the 5th, and while entering the harbor of Charleston on the 9th was fired at and struck by shot from a battery on Morris Island, when she wore round and put to sea again. Intelligence of this battery 'among the sand-hills' had been received at Washington on the evening of the 5th, but the *Star of the West* had gone, and could neither be warned nor detained.

"It was hoped that the mission of the *Star of the West* would remain a profound secret with the few persons whom necessity or courtesy required to know it. On the 2d of January—the last day of the delay occasioned by waiting for the answer of the South Carolina commissioners, which General Scott considered so gentlemanly and proper—it was made the subject of a prolonged and heated discussion in the Cabinet. It ended in a resolution to send an officer to Major Anderson to ascertain whether he wanted or needed re-enforcements. Here Judge Black, apprehensive of another delay, interposed a ques-



tion: 'Does the sending of a messenger imply that no additional troops are to be sent until his return?' 'Judge Black,' said the President, impatiently raising both hands, 'it implies nothing.' But just at this juncture, while Mr. Holt was writing down the interrogatories to be propounded to Anderson, the answer of the commissioners arrived. It excited so much disgust and indignation that there could be no question as to the proper disposition of it. The President wrote across it his curt refusal to receive it, and caused it to be instantly returned. Then turning to the Secretary of War, he said, 'Re-enforcements must now be sent.' The order was made in the Cabinet; but Mr. Thompson, the Secretary of the Interior, did not hear it; perhaps it was not intended that he should.

"For many days Mr. Thompson had been exerting himself to prevent the Carolinians from attacking Anderson—an event which he believed would be equally disastrous to both sections. To effect this purpose—which, to say the least, was not unpatriotic—many telegrams were passing between him and Judge Longstreet, an eminent and comparatively reasonable citizen of South Carolina. So late as the 5th, the very day the vessel sailed, he answered a direct inquiry of his correspondent as follows: 'I can not speak by authority, but I do not believe that any additional troops will be sent to Charleston while the present *status* lasts. If Fort Sumter is attacked, they will be sent, I believe.' When under these circumstances he heard that the expedition was actually at sea, it is not surprising that he was both amazed and shocked. He felt that he had been not only slighted, but deceived, and used as an unconscious instrument to produce a gross and shameful deception upon those who had trusted in his word alone. Was it a violation of his official duty to remove a delusion which owed its existence to him and him only? He had reason to believe that his assurances had thus far done much to keep the peace and to save Sumter from assault. Was he bound to withdraw them now that he knew them to be false, and thus imperil the Star of the West with her freight of human life? He thought he was. Having given an unofficial opinion that re-enforcements would not be sent at the very moment when they were actually embarking, he determined to send an unofficial dispatch to say that they had in fact been sent, but without his knowledge or consent.

"He wrote this dispatch at his house, and exhibited it to Judge Black, who had gone there to dissuade him from the act. The mes-

senger of the department, William W. Cowling, was waiting to carry it to the telegraph-office. He caught a few words of the earnest dispute which followed—Judge Black imploring him not to send it, and Mr. Thompson insisting that it was a matter which deeply concerned his honor. Cowling was convinced by the argument that Judge Black was right and Mr. Thompson wrong. Being a patriot as well as an official, he disobeyed the Secretary's order, put the perilous dispatch in his pocket, and left the Charlestonians to find out the altered state of affairs as best they could. His conduct was cordially approved by Mr. Kelly, of the Interior, Judge Black, and the Hon. John Sherman, to each of whom he revealed it within a few hours. This dispatch, it is very clear, was never sent, but it is equally clear that another was. Mr. Thompson may have suspected the fidelity of Cowling, or may have received another telegram from Longstreet. At all events, he telegraphed that the *Star of the West* had sailed for Charleston with two hundred and fifty troops on board, and that she ought to reach the city on that day. The message did not reach Charleston until twenty minutes after five in the evening. It was none too early, for by daylight the next morning the ship was steaming up the channel—and of the rest the reader is already informed. Of course, Mr. Thompson instantly resigned his office.

"On the 11th of January Mr. Thomas resigned from the Treasury Department, because he disagreed with the President and Cabinet about affairs at Charleston, and especially about 'the authority under existing laws to enforce the collection of customs at the port of Charleston.' General Dix took his place, and henceforth the Cabinet was a unit. Perhaps the spirit by which they were animated as a body was never more candidly expressed than in the following letter :

"STATE DEPARTMENT, *January 17, 1861.*

"MY DEAR SIR : I am much obliged by your letter. It undoubtedly would be a great party move as between Democrats and Black Republicans to let the latter have a civil war of their own making. It would also be poetical as well as political justice to let them reap the whirlwind which must grow out of the storm they sowed. But can we avoid doing something? Is not the business altogether beyond party considerations? For South Carolina compels us to choose between the destruction of the Government and some kind of defense. They have smitten us on one cheek—shall we turn the other? They have taken our coat—shall we give them our cloak also? The gospel commands this in private affairs, but the rule



is not understood, I think, as applying to public property held by a government in trust for its people. I am not in favor of war, but I can not resist the conviction that when war is made against us a moderate self-defense is righteous and proper. Coercion—well, I would not care about coercing South Carolina if she would agree not to coerce us. But she kicks, cuffs, abuses, spits upon us, commits all kinds of outrages against our rights, and then cries out that she is coerced if we propose to hide our diminished heads under a shelter which may protect us a little better for the future.

“ ‘I agree with you that we ought not to make a civil war. Do you disagree with me in the opinion that we are bound to defend ourselves from an unjust and illegal attack? Whatever your answer may be, it can not prevent me from being

“ ‘Your friend, J. S. BLACK.

“ ‘HON. A. V. PARSONS.’

“It is safe to say that no one in high position during these times has received more praise or deserved it less than General Scott. Before the election of Lincoln, before a State had seceded, before it was certain that any State would secede, he laid before the Secretary of War a paper which he called his ‘views.’ It was not inappropriately named, for he presented little else but dissolving views of the great republic rent into ‘fragments,’ of which he volunteered to trace the proper boundaries and locate the capitals. He quoted Paley’s ‘Moral and Political Philosophy’ to show that a nation might use force to preserve the continuity of its territory; but for a secession which made no gap in the Union, which left the continuity unbroken, and merely carried away a dozen or so of neighboring States, he could think of no remedy whatever. Thus, if South Carolina seceded, while North Carolina and Georgia remained, South Carolina might lawfully be coerced; but if all three went out together, there was nothing to be done but to bless them, unless, perhaps, to give them a little considerate advice about the selection of a capital!

“ ‘It will be seen,’ said he, ‘that the “views” only apply to a case of secession that makes a gap in the present Union.’ The falling off (say) of Texas, or of all the Atlantic States from the Potomac south, was not within the scope of General Scott’s provisional remedies. ‘The foregoing views,’ he explained, ‘eschew the idea of invading a seceding State.’ He dreaded ‘the laceration and despotism of the sword,’ and considered the reduction of the Union to ‘fragments’ a smaller evil. Mr. Buchanan thought this part of the document ‘out of time and out of place’—a very mild judgment. It might have

been penned at the headquarters of the South Carolina militia, and read with applause in a secession convention. But after mentioning what his party feelings were like, and what 'ticket' had his sympathies, the general came to the military point in this dreary dissertation. It took only a short paragraph to state it, and consisted of the naked advice to garrison nine forts in the South, so as to make any attempt to take them ridiculous. There he broke off, omitting entirely to designate any force available for such a purpose. The next day, however, he supplied the information. 'There were,' he said, 'in all five companies only within reach'—not enough to make a single one of the forts impregnable. And to this statement he gave the imposing title of 'Supplemental Views.'

"The general repeated his advice on the 15th of December, and on the 28th of January published his 'views' to the world, South Carolina and the cotton States included. What aid and comfort they afforded to the latter can only be conjectured from the character of the document itself. But, determined not to be misunderstood, he saluted the new Administration in the person of Mr. Seward, on the 3d of March, with a letter in which he again aired his political opinions, and, after deprecating the enormous waste and numberless horrors of civil war, which could only end in the conquest of devastated and worthless 'provinces,' he put the sum of his 'views,' about which he had made such a pother, into a single sentence: 'Wayward sisters, depart in peace.'

"When the *Star of the West* was fired upon, Major Anderson made no reply from the guns of Sumter, as he should have done, when he saw his own supply-ship, which he knew and recognized, suffering in the midst of an overwhelming cannonade. But he sent to the Governor to demand a disavowal of the act, and in case of a failure to get it, said he would consider the act the beginning of hostilities and fire upon any vessel that came within reach of his guns. But his zeal departed with his messenger, and when the Governor transmitted, instead of an apology, a demand for the surrender of Sumter itself, he calmly referred the proposition to Washington, and made himself happy with a truce. The major might certainly have done better, for at the moment he considered his position impregnable, boasting of his power to command the harbor and defeat 'any force that might be brought against him.'

"Colonel Hayne, the Governor's envoy, and Lieutenant Hall from



the fort, arrived in Washington on the 13th of January. The latter represented Major Anderson as perfectly secure, while the former bore a demand for the surrender of his position. But nine of the Senators from the cotton States prevailed on Colonel Hayne not to deliver his note until they had time to ascertain whether Mr. Buchanan would agree not to re-enforce the fort, provided Governor Pickens would also let it alone. On the 19th the correspondence between them was laid before the President, who employed the pen of Mr. Holt to say, in reply, that 'at the present moment it is not deemed necessary to re-enforce Major Anderson, because he makes no such request, and feels quite secure in his position. Should his safety, however, require re-enforcements, every effort will be made to supply them.' On the 30th Colonel Hayne presented the Governor's demand, and again Mr. Holt replied in a letter of overwhelming force. The whole subject was beyond controversy. The President had no notion of a surrender, and would not entertain the thought for a moment.

"In pursuance of this policy—now thoroughly established and well understood—another expedition for the relief of Sumter was prepared at New York. It never sailed, for two reasons, either one of which was more than sufficient: first, because it was thought Anderson did not need or want it; and, second, because South Carolina as well as the President was disposed to respect the appeal of Virginia, to avoid hostilities until the Peace Congress should meet and act."

On the 6th of February, 1861, the President had nominated Judge Black to the Senate for Associate Justice of the Supreme Court of the United States, to fill the vacancy occasioned by the death of Mr. Justice Daniels; but, owing to the previous withdrawals of Southern Senators, and certain opposition of Senators remaining, very easily to be accounted for, the nomination was neither confirmed nor rejected, but suffered to fall with the expiration of the session.

Judge Black left office with "clean hands and empty." At the age of fifty-one he returned to the bar to begin life anew, and, in so far as worldly goods were concerned, to begin at the bottom. He now removed from Somerset County to York, where he shortly afterward bought the lands and subsequently built the house so well known under the name of Brockie. In 1861 he was appointed Reporter to the Supreme Court of the United States, and published the

volumes, first and second Black, when he was forced to resign to meet the requirements of a very large and very desirable practice. While Attorney-General he had successfully pressed upon the court a number of rules, which, with scarcely an exception, governed the whole current of decisions in the California cases; and this circumstance it was which gave him the lead and the choice in that whole class of business, and for many years few or none of these cases were heard in which he did not appear either as private counsel for an honest claim, or as special counsel of the United States, or of the settlers, against a dishonest one. To some men this great practice would have yielded a large fortune; it did, in truth, bring him an irregular income out of all proportion to his wants or his original expectations. But he had no taste for the accumulation of money; and, when he had secured a very modest competence, his ambition in that particular was perfectly satisfied. The rest of the golden shower was neglected; he would scarcely stoop to pick it up, or, when he did, he gave it away, or let it run through his hands like water. He never kept a book or an account of any description; never invested a dollar on speculation; and, except the interest product of his comparatively small savings, he never received any money whatever but in fair payment of plain, downright professional labor. He lost large sums by indulgence of clients who were neither entitled to his charity nor in need of it, and he was swindled out of much more by clients and others who dishonestly availed themselves of his known simplicity and easiness in matters of this kind.

Judge Black argued in the Supreme Court nearly all the most important of the California land cases, and in some of them he received fees which seemed large, but were, in fact, not large when considered with reference to the labor, responsibility, and magnitude of the interests involved. But his practice gradually became general, and included the greater number of the so-called political cases arising under the various military orders of the Government which exceeded constitutional authority and struck at the personal liberty of the individual citizen, as well as those arising under the reconstruction laws, which invaded the rights of the States and leveled the bulwarks of self-government. His work during this period in defense of the constitutional rights of the people, and of the institutions designed for their protection, was, in a public sense, the most important of his life, not excepting his bold stand for the Union during the



closing months of Mr. Buchanan's administration.\* In most of these now historical cases he gave his services without compensation; in-

\* Who, in our day, was a greater expounder and defender of our laws than Jeremiah S. Black? Who, of all the men of this generation, has offered upon the altars of legal liberty the devotion of a brighter genius, the enthusiasm of a more ardent soul, than Jeremiah S. Black? . . . He was, likewise, a man of letters, deeply versed in the literature of this and the past ages, and acquainted, to use the language of a distinguished Englishman, with the best thoughts and words of mankind. It was also his good fortune that, owing no doubt to this thorough training in literature, he possessed a wonderful force and lucidity of style. His exposition of most complicated questions of law, his most recondite ideas on all subjects, were made clear and simple to the slowest minds.

His invective has had no parallel, in my judgment, in American forensic literature. In this field his command of the English language has not been excelled on either side of the sea. He was as much superior to Junius as an equal skill in the use of language, combined with a vastly superior legal knowledge, could make him, to say nothing of the superior manhood which made him sign his name to even the bitterest of his philippics.—Senator VANCE, of North Carolina.

Some ten years after hearing him the first time, I heard him for the second time in the *Blyew* case, from Kentucky, reported in 13th Wallace. That effort was the finest combination of law, logic, rhetoric, and eloquence I have ever listened to. When it was finished, a very able attorney of the court, sitting near by, asked me what I thought of it, to which I replied that I had come all the way from my home to look after a little business here, at considerable sacrifice, but, having heard this argument, I was more than compensated. . . . His resources were wonderful, almost boundless, his reading vast, his memory prodigious, his versatility extraordinary. Cicero, in one place quoting from Demosthenes, that action is the chief excellency in speaking, interprets action to mean delivery; in another place he refers to it as enunciation; but Quintilian, in quoting the same, makes it mean pronunciation, looks, voice, gesture, the whole movement of the man speaking. In either and all of the interpretations Mr. Black had this first, this second, this third excellency. He not only became his client, but his client's cause; he was wrapped up and lost in it; he moved and acted in it. So great were his earnestness and power of assertion, I have fancied I could see the convictions of judges giving away reluctantly before him and surrendering to him as he spoke. . . . A rhetorician without a superior—the best phrase-maker I ever heard—he used the English language after the style of Shakespeare; and for clear invective he equaled anything contained in the justly famous article of Macaulay on Barere; a logician, when he stated his case, it was more than half argued; a statesman, molded in the form and style and educated in the school of Mr. Jefferson, he was essentially democratic.—Senator GARLAND, of Arkansas.

If I comprehended Judge Black, and I think we agreed in this, the *principium* of his political and juridical thought was the divinely vested liberty of the man. Government was ordained of God for man. Man was not made for the government. To secure this right is the only legitimate function of government. Every government which denies or violates this right perverts its power, and is a usurpation. To the rude Latin of Magna Charta, to the foundation principles of the Norman-Saxon constitution of our fatherland,

deed, some of the most momentous causes ever heard in the Supreme Court—notably those of Milligan and McCardle—were prepared by him at vast expense of time and labor, and argued with unrivaled power, without fees or the hope of fees. His professional ethics were grounded upon doctrines seldom recalled in this sordid age, wherein the noble science of the law is so frequently and so openly prostituted to Mammon. He gave his services freely whenever the rights of the public or the liberties of men were in jeopardy, feeling that he owed the protection of his professional skill not only to organized society, but to every individual in need of it, and especially to those who were most in need of it and least able to pay for it.

Judge Black was counsel for President Johnson in his trial by the Senate on articles of impeachment; but he left the case after the President's answer had been filed, for reasons very clearly stated in a letter to his distinguished client. He was counsel for Secretary of War Belknap upon his trial before the Senate for corruption in office, and defended him on the ground that he was no worse than his political associates, and ought not to be made the scapegoat to carry the sins of the whole off into the wilderness. He was also of counsel for President-elect Tilden before the Electoral Commission of 1877, where he denounced the fraud then about to be consum-

to that bundle of institutional liberties which our fathers bound up in the venerable Constitution of 1789, Judge Black ever appealed, with a magnetic eloquence which thrilled the hearts of English-speaking men everywhere, to protect the liberty of the man from lawless authority, and to rescue him from the mailed hand of military despotism. His argument in Milligan's case stands as an enduring monument of his genius and his courage, in making the *habeas corpus* an impenetrable shield against all the weapons of civil and military power.

But he found it needful to these personal rights that the local autonomy of each State should be secured from the centralizing tendencies of the Federal Government.

Jealousy of all power, political and corporate, which threatened to abridge the freedom of the man, was the motive force in Judge Black's life as a jurist and statesman. To protect the man from the ill-used or ill-gotten power of government and corporations and associations, to protect the States against Federal encroachment, these were the cardinal principles which guided his political and judicial life.

In the consistent maintenance of these cherished convictions Judge Black was fearless and aggressive. His trenchant pen, his burning eloquence, his compact logic, lighted by his wit and humor, sparkling to delight his friends, and blazing to terrify his foes, his keen irony, his caustic sarcasm, his scorching satire, and his fierce invective, made him foremost among the writers and advocates of his day.—HON. J. RANDOLPH TUCKER, of Virginia.



mated, in words which have since passed into the common speech of men.

The convention of 1872, to reform the Constitution of Pennsylvania, was a body remarkable not less for the high character of its membership than for the spirit and scope of its labors. Its roll comprised all the most distinguished names in the recent history of the Commonwealth, and it was, in every respect, an assemblage worthy of the illustrious Meredith, its first president. It is too early to estimate correctly the whole importance of its work, which was approved by the people without distinction of party, and ratified by an unprecedented majority. But its value seems, by ten years of experience, to have been placed beyond dispute, though the real magnitude and character of the reforms effected by it are but now coming to be clearly understood. Judge Black was a delegate-at-large, and for nearly a year was one of the most considerable figures in the convention, and certainly one of the most interesting, by reason of the radical nature of some of his propositions, and the curious reasoning, quaint eloquence, and singular wit, with which he supported them. He was especially earnest in behalf of the strongest restraints upon corporations, and of an "iron-clad oath" to be taken by members of the General Assembly at the expiration of their terms, swearing that they *had*, in fact, behaved themselves well and truly in their offices as they had sworn to do when they assumed them.

The convention assembled on the 12th of November, 1872, and adjourned *sine die* on the 27th of December, 1873. On the 2d of October, 1873, Judge Black resigned. He had served during the whole period without pay. The Legislature appropriated one thousand dollars to each member. It subsequently repealed the act, and authorized the convention to fix the compensation of its own members, which it did, making the sum fifteen hundred dollars. But Judge Black held that the Legislature only could make a lawful appropriation of public money, and the members were entitled to nothing under the appropriation made by themselves. It was a nice scruple, which does not appear to have been shared by any one else in the convention; and every other member received the increased salary without question. In presenting his resignation, Judge Woodward said: "It is probably known to every gentleman on this floor that Judge Black conceived that the Legislature had no right to turn over a sum of money to be disposed of by this convention for the salary of

members. Acting upon his own personal conviction, he has declined to receive any compensation whatever, and has not received a dollar of compensation for his services in this body; nor does he propose to do so unless the Legislature shall hereafter make an appropriation in the form of the Constitution, which appropriation he does not expect the Legislature to make." The convention was very reluctant to accept Judge Black's resignation, notwithstanding Judge Woodward's assurance that it was impossible he should ever occupy the seat again. The subject was postponed from time to time; a committee was appointed to wait upon Judge Black and request him to return; but he could not, for many reasons, alter his determination, and on the 13th of October, eleven days after its date, the resignation was accepted. Judge Black had lost many thousands of dollars in his practice by this year's public service, but he had made the sacrifice cheerfully, in the hope of accomplishing for the people of Pennsylvania sundry constitutional reforms which he deemed essential to their welfare.\*

During the later years of his life Judge Black labored almost incessantly, and in a great variety of publications, some of them exhibiting his highest powers of legal statement, to bring the carrying companies of the country under the control of the State and of law. It was a task purely gratuitous, undertaken solely from an irrepressible love of justice and an uncompromising sense of right. He considered Article XVII of the amended Constitution of Pennsylvania one of the most wholesome it contained, and he determined to do his share toward holding the evading railroads to it, and "to hold them hard." He had no ambition; that, even had there ever been a day when he could have served it in this way, was long since spent. Freely and frequently as he was maligned in the course of his beneficent work by the paid legionaries of those who profited by the enormous abuses of irresponsible railway management, he knew that time would show the soundness of his principles and the disinterestedness of his motives as well. He had no purpose whatever to serve but the protection of the people against corporate aggressions, from which

\* Judge Black was appointed one of three arbitrators by the States of Maryland and Virginia to settle the disputed boundary between those States. The original arbitrators were Judge Black; ex-Governor Graham, of North Carolina; and ex-Governor Jenkins, of Georgia. Governor Graham died before the hearing; and Senator Beck, of Kentucky, was substituted. The final award was made in January, 1877.



they had suffered grievously in the past, and were likely to suffer more grievously in the future, unless the constitutional remedy of "appropriate legislation" should be promptly, honestly, and fearlessly applied. His last public appearance was made in support of this great cause before the Judiciary Committee of the Senate of Pennsylvania.

Of his remarkable gifts as a "talker"—of the rare conversations, more interesting than the more deliberate produce of his pen, and fully as instructive—no record, for the most part, unfortunately remains, and none, at all events, could be given here. A book of his table-talk would be a contribution to that kind of literature inferior in interest and value to none of the class. A second Boswell might have done as much for his fame as the first one did for Dr. Johnson's. Certain it is, at any rate, that neither the full extent of his mental powers, nor the strength, sweetness, and simplicity of his general character, were known to those who had not seen him in private, and witnessed the play as well as the work of that great understanding.\*

\* No more unaffected man nor delightful companion could be imagined. The charm of intercourse with such a man was one of life's great pleasures, to be appreciated only by those who had enjoyed it. And now it is gone, save only as memory may be able to preserve it.

Proofs of his great powers in judgment, controversy, and literary performance remain to us in his writings; but, unless it be to those who knew him personally, it is all in vain to attempt to describe the subtle charm of the gifts, the attractions, the personal virtue that built up the man we loved so well, honored and admired so highly, and so deeply mourn.—Senator BAYARD, of Delaware.

In social intercourse he was genial, fascinating, and instructive. Who can ever forget the charms of his conversation, the strength and devotion of his attachments, or the fidelity and tenderness of his great heart to his family and friends?—Hon. J. RANDOLPH TUCKER.

We shall ever remember Judge Black as a most fluent talker, entitled to a high place among "The Great Conversers"—and in Professor Mathew's charming little book of that title, in any future edition, he must appear to some extent, or there will be a material omission. In a book of American *ana*, his wise and witty sayings and eloquent observations, flung out on the spur in his animated talks, would, to the delight of the readers, fill a good many pages. He needed but a Boswell to make him in that respect appear equal to Johnson. Talk was his kind of dissipation—his intoxicant—the means for exhilaration, like wine to the more sluggish.—THOMAS J. KEENAN, Esq., *Pittsburg*.

That he belonged to a giant race of lawyers, now almost if not quite extinct; that many of his judgments from the bench equal in directness, force, and elegance of style the best judicial writing in the literature of our jurisprudence; that he was the greatest advocate at the bar this country has had seen since Pinkney; that his diction was richer than Macaulay's and more brilliant than that of Junius; that his speech and thought often

It will be unnecessary to inform the reader of the following pages that Jeremiah S. Black was a devout Christian. Fearing nothing else in this world, he went always and humbly in the fear of God. His whole mind and being were saturated with the morality of the Testament of Christ, which, he said, was "filled with all forms of moral beauty, and radiant with miracles of light." He was baptized in 1843 by Alexander Campbell, whose eulogy he pronounced upon the unveiling of his statue at Bethany, West Virginia.

Judge Black expired at Brockie on the 19th of August, 1883, at about two o'clock in the morning. The windows of the chamber in which he lay during his last illness afforded one of the fairest prospects on this earth, and one which he loved beyond all others. In no heart that ever beat was the sentiment of home more predominant than in his; and not Brockie only, with its inmates, but the whole scene around it—the rich landscape, the fertile farms, the thrifty, independent people, with whom he thoroughly enjoyed the sense of good neighborhood—were very dear to him. Unable to rise and see for himself, he asked his wife to go to the window and tell him how it looked, especially if the fields were green; and he listened to her report with simple and touching eagerness.

He knew from the first that he was fatally stricken, and no assurance to the contrary produced the slightest impression. But he said very little on the subject. In his broad view of the economy of nature and of God, dissolution of this mortal life was an event not to be dreaded but to be soberly welcomed by one who had no reason to fear the face of his Judge. To one of his family he said, "I would not have you think for a moment that I am afraid to die." And to an-

recall the sagacity of Montaigne and the humor of Rabelais; that he was a patriot minister of state who stood by his country, when others faltered, in the darkest hour of its history; that he would have gone to the block as cheerfully as any man that ever lived for any opinion he held dear—these are well-known and now, I believe, generally conceded facts in the life and character of Judge Black; but all do not know so well, for those who came closely in contact with him alone could know, how ingenuous he was in all his personal relations, how unselfish in his kindness, how cheerful and cordial in his intercourse with friends, how genial, gentle, and unpretentious in his manner, how original, simple, and unaffected in all his ways and in all his words. His nature was not spoiled by his great reputation. The sweet sensibilities of his heart were not touched by the corroding or the chilling influences of public life. His great manhood stood by him to the last, and he died, as he had lived, a simple, direct, and earnest man.—J. HUBLEY ASHTON, Esq., *Washington, D. C.*



other: "My business on the other side is well settled—on this it is still somewhat at loose ends"; and then proceeded in ordinary voice and apparently in ordinary spirits to give certain instructions about his worldly affairs. These expressions were each of them made in the hearing of but one person. There were no scenes—none of the usual death-bed incidents. His visible descent to the grave, except for the great bodily anguish he endured, was perfectly serene, and he lay down to the long rest he had so well earned with all the majesty of his natural character about him.

In all the intervals of intense suffering throughout that memorable week, he indulged the usual flow of clear, delightful conversation, lighted up with his usual wit, rich with his customary humor, and abounding in amusing anecdotes and interesting reminiscences. No one who had seen him, without knowledge of his actual condition, could have imagined that all this while he was consciously dying, and that the time remaining to him had been measured in his own mind by hours, and they rapidly diminishing!

Realizing the approach of the parting moment—the parting of life and of ties more dear—he uttered that prayer, unsurpassed for its simplicity and tenderness in the literature of human devotion: "O Thou beloved and most merciful Father, from whom I had my being and in whom I ever trusted, grant, if it be Thy will, that I no longer suffer this agony, and that I be speedily called home to Thee. And, O God, bless and comfort this my Mary."

He died at about ten minutes past two o'clock on the morning of Sunday the 19th of August. His death was worthy of himself.

"Our children will marvel what manner of men their fathers were among whom there could have been a difference of opinion about the merits of such a man. His fame, like a mighty river, will grow wider and deeper as it rolls downward."

NOTE.—The last book Judge Black had in his hands was the second volume of the "Life of James Buchanan," by Mr. Curtis, then several months from the press. He had opened it at the account of Mr. Buchanan's death, and had evidently read it with deep interest, for the leaves were not cut but rudely torn apart by running his thumb through them. He never saw that part of the work which concerned himself. Those pages were neither cut nor torn. Having read this story of the death of his greatly honored friend, he walked out upon the broad veranda of Brockie, gazed thoughtfully at the shadows of the clouds chasing each other across the moonlit hills—the last look he ever cast upon the world—and retired to the bed from which he never rose.

It was that day, his family suppose, and before opening the Life of Mr. Buchanan,



that he wrote the following lines, manifestly the beginning of a very brief reply which he intended to make to the famous assault upon him by Mr. Jefferson Davis. It was the last time he held a pencil in his hand. The reader familiar with Judge Black's style will detect a melancholy tone in this fragment, very unlike the opening passages in any other of his many controversial papers. It is believed that one sheet was swept by the wind through the open windows of his library and lost:

I do not see as clearly as some of my friends the necessity of answering General Davis's late article in the Philadelphia "Times." As a contribution to history, true or false, it amounts to nothing; as a reargument for secession, it is the very flattest of all his numerous failures; as a personal assault upon me, it is so surprisingly feeble and awkward that it inflicts no wound. But his weapon is smeared with venom, which, if not attended to, may fester in the scratch. By reason of this last fact, and because the character and career of Mr. Davis are regarded with great interest and admiration by a large portion of the country, I can not treat him with contemptuous silence.

My original sin against him consisted in utterly rejecting the doctrine that a State had a right to secede and dismember the Union whenever its political leaders chose to take a huff at the result of a presidential election, or lose their temper by falsely anticipating some maladministration of Federal powers. The States have rights carefully reserved and as sacred as the life, liberty, and property of a private citizen, but to say that among these rights is that of expelling from its territory the officers of the General Government, resisting the execution of its laws, and abolishing its Constitution, is to utter an absurdity too absolutely gross to be entertained by any man who has bestowed one rational look upon the subject. This is a conclusion too simple to allow of argumentation either *pro* or *con*. It is not with me a matter of mere belief. I know it as every man knows how many fingers he has to his hand as soon as he counts them. If my opinions, carefully formed and faithfully adhered to, were in conflict with his interests, wishes, or feelings, I can not help it. Nobody desired more ardently than I did that he should look for peace, safety, and justice where alone he could find them, inside of the Union and under the shelter of the Constitution. But, in spite of all entreaties, arguments, and demonstrations of the truth, he would go out and drag his people out with him into secession. He proudly put himself at the head of the movement to dismember the nation; he wrecked his cause, brought hideous ruin upon his followers, and left himself without an object in life except to throw the blame of his disasters upon somebody else.

"Ill-weaved ambition, how much art thou sbrunk!"

The Philadelphia "Press" of September 10, 1883, contained a ten-column article entitled "Judge Black's Answer." It was published as being substantially the reply which he would have made to Mr. Davis had he lived. It made no pretensions to verbal accuracy, but was the reproduction from memory alone by Colonel Frank A. Burr of a conversation with Judge Black on the day Mr. Davis's letter appeared in the "Times." The writer hereof was not present at the conversation, and is, therefore, unable to bear positive testimony to the correctness of the report. But the internal evidence was so striking and abundant that he has never thought of questioning it—nor, indeed, has any one else. It was, on the whole, one of the most marvelous feats of reporting ever accomplished. Previous publications by the same gentleman in the same journal had thrown a broad glare of light over the events of 1860-'61, and the last interview was but the crowning one of a very brilliant and useful series.

## MISCELLANEOUS.

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ADDRESS DELIVERED BEFORE THE AGRICULTURAL  
SOCIETY OF SOMERSET COUNTY, AT ITS ANNUAL  
EXHIBITION, OCTOBER 6, 1854.

GENTLEMEN OF THE AGRICULTURAL SOCIETY : Of course, I am not expected to give you any instructions in the details of practical agriculture. If I were competent to such a task, this is not the occasion to execute it. An essay on the breeds of cattle, or the genealogy of horses—on the process of making butter, the composition of manures, or the cultivation of particular crops—would, at present, be out of place and out of time. My purpose is broader, if not better, and more general, if not more useful. The duty assigned to me will be done if I lay before you a few of the facts and reasons which tend to establish one most important truth, namely, that the art which you profess is in a condition which needs, and will most amply repay, a vigorous effort to improve it.

When those who belong to a particular profession hear themselves addressed by one whose life has been devoted to a different pursuit, they take his advice reluctantly, or not at all. They believe as far as they please. It is so much easier to *talk* than to *do*, that an outsider can never speak as one having authority. But I do not know why you should not take a suggestion, or listen to a remonstrance, let it come from whom it may. There is nothing at all suspicious in the fact that a merchant or mechanic, a physician, minister, lawyer, or judge, takes a deep interest in your business. It is their misfortune that they do not follow it, for most of them would if they could. The *taste* for agricultural employments and rural scenery is almost universal. The cultivation of the earth is the only trade which God ever commanded any man to exercise ; and it seems to have been a part of the divine economy to surround it with attractions. Our natural organization is fitted for the country, and not for the town. The human eye is so formed that it rests with pleasure on green and blue, and can not, indeed, endure any other color for a long time without



much less how any one can oppose you—unless he belongs to one or other of the four classes which I am about to enumerate: 1. There are men who think that agriculture is wholly incapable of any improvement whatsoever. With them farming is farming, and nothing more; knowledge can not do it better, nor ignorance worse; the business is now, and was, when Adam left the garden of Eden, in as perfect a condition as it ever can be. 2. Others believe that, though much more might be known, it is not best that they should know too much, especially about their own business. In their opinion the tree of knowledge continues to bear a forbidden fruit, and no man can make himself a perfect fool except in one way, and that is by being wiser than his father. 3. Those who belong to the third class assert that agricultural societies are not the fit and proper means of spreading among the people the knowledge which they admit might, and ought to be, communicated in some way. 4. The fourth set are almost too contemptible to be mentioned. They bear to the country the same relation that hardened sinners do to the Church. They don't care. You may convince them that this cause is a good one, and still its success would give them no pleasure, its failure no pain. Such people never regard anything beyond their own most immediate and most selfish interests.

It would be an insult to this assembly to suppose that it contains a single person of the description last mentioned. I do not believe it does. It will be sufficient, therefore, for all present purposes to show *that great and very desirable improvements may be made in agriculture by means of agricultural societies.*

Improvement—what do we mean by that word? An art is improved simply by the use of more *science* in the practice of it. I know very well that the mention of scientific farming suggests to many minds the idea of a *model farm*, conducted on fanciful principles, by some soft-handed gentleman with plenty of money and not much common sense—a place pleasant enough to look upon, but very expensive—absorbing annually from other sources of the owner's income three or four times as much as it produces. But this is not what I mean. The improvements I speak of are those which will lighten labor and swell the profits; improvements which can be *measured* by the increased value of your land, and the additional number of dollars in your purse at the end of each year.

The earth is a machine, with certain powers which are in constant motion during the summer season, carrying on the process of vegetation. Like other machines, it is liable to get out of order. It also resembles other machines in the fact that the value of its products depends mainly on the skill and care of those who attend it. Badly managed, it turns out bad work, in small quantities, and its powers are speedily exhausted. With more skill, it will yield larger and bet-



"Whose womb immeasurable, and infinite breast,  
Teems and feeds all."

But, though it be true that agriculture is the most useful, as well as the most attractive, of all pursuits, it is equally undeniable that it has advanced more slowly than any other toward the perfection of which it is believed to be capable. Speaking comparatively, it can scarcely be said to have advanced at all. In everything that aids commerce and manufactures, improvements are made which have changed the whole face of human society. Those interests are projected forward into the future, with a force which overleaps centuries, while agriculture creeps on with the slow pace of the hours. In other departments ingenuity and skill have supplied the place of labor, but the hard toil of the husbandman has not been perceptibly lessened, nor his profits in any striking manner increased. Even the useful improvements that have been invented are slowly and suspiciously accepted. No class of people in the world, except lawyers, are more reluctant than farmers to change an old mode of procedure for a better one.

This has been seen and felt as a great misfortune by those who are determined to mend it if they can. They do not believe that there is any inherent difficulty in the nature of the subject, which should make the progress of agriculture less than that of other branches of industry. Scientific men and practical men—men who think and men who work—are everywhere giving their attention to this, as the greatest of human concerns. If the effort be successful, those who aid in it will earn a title to public gratitude such as no conqueror ever won with his sword.

One of the forms which this movement has taken is that of *Industrial Exhibitions*. The great shows at the Crystal Palaces of New York and London may have done some good. It is certain that the *State Fairs* have been exceedingly beneficial. But *County Exhibitions*, when they become general, will be fairly worth all others put together, because their effect and influence come directly home to the business and bosoms of the very persons by whom alone the cause must be carried through. It is on the local societies that the chief reliance is placed. I trust that the day when an agricultural society was formed here will be an era on which your memories and those of your children will love to linger.

To make the society useful, it is necessary that we should be as nearly unanimous as possible. We must disarm hostility wherever we find it, and rouse the indifferent to active exertion. We may reasonably hope that what we see and hear on this occasion will contribute something to that end.

I do not see how any man can withhold his assistance from you—

much less how any one can oppose you—unless he belongs to one or other of the four classes which I am about to enumerate: 1. There are men who think that agriculture is wholly incapable of any improvement whatsoever. With them farming is farming, and nothing more; knowledge can not do it better, nor ignorance worse; the business is now, and was, when Adam left the garden of Eden, in as perfect a condition as it ever can be. 2. Others believe that, though much more might be known, it is not best that they should know too much, especially about their own business. In their opinion the tree of knowledge continues to bear a forbidden fruit, and no man can make himself a perfect fool except in one way, and that is by being wiser than his father. 3. Those who belong to the third class assert that agricultural societies are not the fit and proper means of spreading among the people the knowledge which they admit might, and ought to be, communicated in some way. 4. The fourth set are almost too contemptible to be mentioned. They bear to the country the same relation that hardened sinners do to the Church. They don't care. You may convince them that this cause is a good one, and still its success would give them no pleasure, its failure no pain. Such people never regard anything beyond their own most immediate and most selfish interests.

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ter products, with less labor and expense, while its capabilities will become greater by use. The knowledge necessary to keep this grain and fruit making machine running to the best advantage is agricultural science.

If you relied for a living on a water-mill or a steam-engine, you would not be content without knowing as much about its structure, and the laws of its motion, as would enable you to get the most out of it with the least wear and tear. This would be mechanical science.

Science is the handmaid of art. The latter can not exist, even in a rude state, without the former. I do not say that every artisan is bound to comprehend the whole *theory* of his trade. But he should know—or, at least, he should not refuse to know—the practical results of other people's experience, as well as his own. Very little is done in this world by mere force. Blind labor swells its muscles and strains its nerves to no purpose. The miner digs in vain until geology tells him the position of the treasure he seeks. The dyer can not make his colors adhere unless chemistry furnishes him a mordant. Optics must teach the painter the law of perspective before his picture will stand out on the canvas. The vessel of the mariner will float at random until he learns from natural philosophy that the magnetic needle points to the pole.

It is thus that Science aids us in the commonest business of life, and scarcely claims the work as her own. Star-eyed and glorious as she is, she disdains not the humblest employments. She comes to you with benevolence and truth beaming from her face, and offers her service, not only to decorate your houses and train the flowers in your garden-plots, but to fashion your implements, to compound your manures, to sow and gather your crops—to relieve you, in short, from a whole world of drudgery, and to scatter plenty all over the smiling land. She will put time and space under your command, and pour out uncounted heaps of treasure at your feet. It was of her that Solomon spoke when he said : “ Her merchandise is richer than the merchandise of silver, and the gain thereof greater than fine gold. She is more precious than rubies, and all thou canst desire is not to be compared unto her. Length of days is in her right hand, and in her left hand riches and honor.”

Without Science, man, the ruler of this world, would be the most helpless of all animated beings. His Creator made him the monarch of the earth, and gave him dominion over it, to govern and control it ; to levy unlimited contributions upon it, and convert everything in it to his own use. But he found himself at the head of a revolted empire. All its physical forces were in a state of insurrection against his lawful authority. The inferior animals were his enemies. The storms poured their fury on his unsheltered head. He was terrified by the roar of the thunder, and the lightning seared his eyeballs. He was

parched under the hot sun of summer, and in winter he was pierced by the cold. The soil, cursed for his sake, produced thorns and thistles. The food that might sustain his life grew beside the poison that would destroy it, and he knew not how to distinguish the one from the other. The earth hid her minerals deep in her bosom, and guarded them with a rampart of thick-ribbed rocks. The rivers obstructed his passage; the mountains frowned their defiance upon him; and the forest spread its gloom around him, breathing a browner horror upon the dangers that beset his way. If he left the dry land and trusted himself to the ocean, the waters yawned to engulf him, and the tempest came howling on his track. He seemed an exile and an outcast in the world of which he was made to be the sovereign. But Science comes to rescue the powerless king from his misery and degradation. Gradually he learns from her the laws of his empire and the means by which his rebel subjects may be conquered. From age to age he accumulates the knowledge that clothes him with power and fills his heart with courage. Step after step he mounts upward to the throne which God commissioned him to fill. He holds a barren scepter in his hand no longer. Creation bends to do him homage. The subjugated elements own him for their lord, yield him their fealty, and become the servants of his will. The mine surrenders its treasures; the wilderness blooms around him like a new Eden; the rivers and the sea bear his wealth upon their bosom; the winds waft his navies round the globe; steam, the joint product of fire and water, becomes his obedient and powerful slave; the sunbeams are trained to do his painting; the lightning leaps away to carry his messages, and the earth works with ceaseless activity to bring forth whatever can minister to his gratification.

But the whole of his empire has not yet been entirely subdued. The richest portion of it—the agricultural region—has been much neglected, and there he has won but a partial supremacy. Science is organizing an “army of occupation” to march into it to take complete possession, to tame the rebellion of Nature, and to bring all her powers under the absolute sway of man, their imperial master. You will volunteer for the war when you think how much has been effected in other departments by similar expeditions. The fight is not to be dangerous, nor the result doubtful. At the worst you will only be annoyed for a while by Ignorance and Error, those savage but not very formidable bush-fighters, who will hang upon your flank and rear. The victory, which must come, will crown you with laurels, bloodless but green with an everlasting verdure, and load you with spoils to enrich you and your children in all coming generations.

Every one knows that this is an age of progress. No one is so ignorant as not to know that in modern times the laws of nature have been revealed with a fullness, and defined with a precision, unparalleled.



at any former period. It is equally well known that these discoveries have been used, with prodigious effect, in all the arts, except agriculture, to which they are applicable. The facts and figures which mark some of the capital points of this progress will not be inappropriate; for I repeat that Science stands ready to do for you all that she has done and is doing for others.

A single steam-engine now carries at the rate of five hundred miles a day the same quantity of goods which, forty years ago, it required seven hundred and fifty horses to haul at the rate of fifteen miles a day.

In the business of weaving, one man now does with ease what it taxed the hard labor of twelve hundred to perform before the invention of the power-loom.

All sorts of manufactures are carried on in ways so much superior to those which were used, even one generation ago, that goods of every description are furnished to the consumer very much cheaper, and many of them at less than one tenth of their former price; and this, although the demand has been enormously increased, and the profits of the manufacturer are much greater than ever.

Macaulay says that in the reign of Charles II—not further back than twice the length of an old man's life—a letter sent by mail from London to one of the midland counties of England, where it would go now in four or five hours, was as long in reaching its destination as it would be at this day in going from London to the interior of Kentucky.

A man may start from here, cross the Atlantic, visit every capital city in Europe, and return home again, in less time than used to be required for a trip to St. Louis.

The means by which those who "go down to the great sea in ships" have brought their art to its present state, is an illustration as striking as any that could be given of the practical use which has been made of scientific discoveries. It is an old tradition that the first idea of navigation was suggested to the mind of an ingenious savage by seeing a hollow reed, which had been split longitudinally, floating on the water. He took the hint and made himself what, in Western phrase, would be called a "dug-out." In process of time oars were added. Then came a more complicated vessel, with sails to move and a rudder to guide her. In this a bold navigator would venture from headland to headland, keeping one eye carefully on the shore and the other on the clouds. At length they learned from the old Chaldean shepherds how to steer by the stars. With this little knowledge of astronomy they went far away from land, though it became wholly useless just at the time it was most needed—when the skies were overclouded and the tempest came out on the deep. Navigation stood still at that point for thousands of years, because it was

believed (as some farmers now believe of *their* art) that it was already too perfect to be improved. But see what modern discoveries have brought it to ! The mariner now leaves the port of his departure with a serene and steady confidence in his resources. Astronomy, natural philosophy, optics, magnetism, the whole circle of the physical sciences, and numerous instruments, contrived with the most exquisite mechanical skill, are all at his command. He can measure his rate of sailing exactly, and knows the course he is on with absolute certainty. When he is a thousand miles out, if he doubts the accuracy of his reckoning, he is able to correct it. He lifts to his eye a tube fitted with glasses through which he can see far out into illimitable space—many millions of miles beyond the reach of his unassisted vision. He ascertains the relative position of some awfully distant world ; and thence, with the help of his chronometer and his nautical almanac, he calculates his longitude. Another observation with a different instrument upon another celestial body gives him the means of finding his distance from the equator. Combining these two results, he puts his finger upon a spot in the chart and says with undoubting confidence, "I am precisely there." Geography tells him where to steer his vessel for the port of her destination, and how to avoid all the dangers that lie between. He holds her head to the true course, and fearlessly stretches away over the dark-blue waters, and they bear him onward like the horse that knoweth its rider. When to this is added the power of steam to propel him, it may well be said that he has conquered both wind and wave. Fire may consume his vessel, or an iceberg may shatter it ; but the ordinary perils of the sea are reduced almost to nothing.

Our all-wise Creator has endowed us with no faculty in vain. He permits us to discover no useless truth. Some, which appeared the most unpromising and barren, have borne the richest fruit. A nameless philosopher, somewhat more than three thousand years ago, was handling a piece of amber, called in his language *electron*. He saw that, when it was briskly rubbed, it had the power of attracting and holding to it certain light substances. He thought it was endued with some kind of animal life. This satisfied *him*, and no better explanation of the marvel was given for several centuries. Yet there was the germ of that science out of which arose the voltaic pile and the galvanic battery, whose powerful interrogations of nature have compelled her to yield up the most important secrets of chemistry. Still, no one dreamed of the identity of lightning and electricity ; and Franklin's letter, suggesting it, was read in the Royal Society at London amid roars of laughter. Neither philosophers nor unlearned men could believe that the crackling noise produced by rubbing a cat's back was caused by the same agent which "splits the unwedgeable and gnarled oak." But Franklin quietly drew it down from the cloud



along the string of his kite, and he knew that his name was linked forever with the grandest discovery of the age. It was immediately turned to practical account. In every part of the civilized world iron rods arose above the houses, and pointed toward heaven, to catch the lightning and lead it away. Franklin had accomplished for all timid people what Macbeth desired for himself, when he wished that he might

". . . tell pale-hearted Fear it lies,  
And sleep in spite of thunder."

But the end was not yet. The great triumph of the *amber science* was still to be achieved. You see it now in the vast system of electric wires distributed all through the country, along which the "sulphurous and *thought-executing* fires" go flashing with intelligence, wherever they are sent by the will that controls them—bearing the news of life and death over mountain and lake, and river and valley—clearing thousands of miles at a single bound. By means of this amazing instrument the eloquence of the statesman thrills in the nerves of the people at each extremity of the nation almost as soon as it is uttered at the Capitol; the friend at one side of the continent takes counsel with his friend at the other, as if they stood face to face; and the greeting of the far-off husband leaps in an instant to the heart of his wife, and makes the fireside of his distant home glad with the knowledge of his safety.

Science has extended her dominion even over regions which seemed to be entirely ruled by the fickle scepter of Chance. Life is proverbially uncertain; yet nothing can be truer than the life-tables of an insurance company, when its officers desire to make them so. The destiny of each human individual is hid in deep obscurity—shadows, clouds, and darkness rest upon it, and conceal it from every eye except the all-seeing One. But disease and mortality do their work on large communities by general laws. The average duration of life, and the average amount of sickness, in a nation, can be counted beforehand with perfect accuracy. Thus, while the individual man is a mystery to be solved by Omniscience alone, man in the aggregate is reduced by his brother-man to a mathematical problem.

We dare not boast of much improvement in law or politics. Indeed, they seem to be growing worse. While other things are rising, they have a fatal proclivity for the downward track. They darken with error in the full blaze of surrounding truth. But medicine has advanced with magnificent strides. Life is much longer, and health far better, than they used to be. When the cholera came to London in a form so frightful that every one was appalled by the report of its ravages, the mortality was not greater than it had been at the healthiest times a hundred and fifty years earlier. Truly did Solomon say that "Wisdom has length of days in her right hand."

What the trade of the Mississippi and the Hudson was before steamboats—what the manufacture of cotton was before the days of Arkwright or Whitney—what ocean-navigation was before the invention of the compass—what land-traveling was before railroads—what medicine was when a patient was steamed for the small-pox—such is agriculture in the present stage of its progress. It will not have its due until it is up, at least, to their present condition. There is a certain amount of skill and science applied, every day, to the working of this machine, which we call the earth. It would be as wise to forget all that as to learn no more. He who has a race to run is not surer of losing the prize, when he turns upon his tracks, than when he stands still in the midst of his career. To look back over the ground already traversed will be an incentive to the work which is yet to be accomplished. If something has been done in the dark time that is long since past, what may we not hope for with the sunlight of modern civilization beaming on our path? It may startle some of you, and sound in your ears like a slander, to tell you that you are all scientific farmers. It is true, nevertheless. That knowledge, whether it be much or little, which comes from experience, remembered and arranged so as to be ready for use when wanted, is science. There was a time when it did not exist at all in any degree. When we reflect how high we are placed by the little we have above those who have none, and what a struggle it must have cost somebody to introduce it at the beginning, we shall appreciate its value, and perhaps make an effort to get more.

Let your imaginations carry you back to the time when agriculture was in its infancy—before the earliest dawn of Greek civilization. In those days men depended principally upon the chase for a living. They ate the flesh and clothed themselves with the skins of wild beasts. Fruits and other vegetables of spontaneous growth added to their luxuries in summer. They were not long in discovering one fundamental law of nature, namely, that seeds deposited in the ground would grow, and produce similar seeds in larger quantities. But they knew nothing of the difference between one soil and another. They preferred the poorest, because it was easiest cleared, and, lying higher up on the ridges, it needed no draining. Here they made holes in the ground with sticks, and dropped the seeds a few inches below the surface. The rest was left to nature. If such cultivation gave them a two or three-fold crop, they were lucky. It happened much oftener that its growth was choked with weeds, or that it met with some other evil chance by which

“The green corn perished ere his youth attained a beard.”

The planting and gathering were left to women and children; the men despised such work, as being inconsistent with their honor and



dignity. Hunting and fighting were the employments in which they found pleasure and glory, as well as food and clothing. But there was one man among them more thoughtful and observant than all the rest. He had watched the unfolding vegetation, from the sprouting of the seed to the maturity of the fruit, with a keen perception of the whole marvelous and beautiful process; and he devoted his attention to the rearing of useful grains with a pleasure which he had never felt in the excitement of the chase. He discovered the proper season for planting; he noticed that weeds were unfriendly to the growth of his crops; he found that mixing certain substances, such as ashes and decomposed leaves, with the soil, would increase its productiveness; he learned that stirring the ground about the roots of a plant would make it thrive more rapidly; he even got himself a kind of hoe made by some cunning worker in iron. Here was a philosopher, whose intellectual stature rose high above that of his fellows. Being a patriot, also, and willing to do good for his countrymen, he conceived the thought of persuading them to quit hunting and win a surer living from the earth. At his request they assembled under the spreading oaks to hear his plans; and this was the first agricultural meeting—I will not say the first on record, for I do not know that it is recorded, but certainly the earliest you ever heard of. The sage unfolded his new science to them, proving it, as he went along, by the facts of his own experience. The chase, he said, was a precarious business at best, while agriculture would be a sure and steadfast reliance. He told them that he himself, with the moderate labor of his own hands, had gained in a single season what would sustain life longer and better than all the spoils taken, during the same time, by the best ten of their hunters. This, he asserted, was true of an ordinary season, but sometimes the game disappeared entirely. His voice grew deeper, and its tones had a melancholy impressiveness, as he described the sufferings endured by them all, when they, the strong sons of the wilderness, with their wives and children, became the prey of gaunt famine and wide-wasting pestilence. He concluded by promising that long lives of wealth and contentment should repay them for a general devotion of their labor to the cultivation of the earth.

No cheers followed the speech, but, on the contrary, hoarse murmurs of disapprobation came up from the multitude, swelling by degrees into loud opposition. The new measure was attacked with all those shallow sophistries—those miserable fallacies so hollow and truthless—with which Conservatism arms her ignorant votaries. That solitary defender of truth was overwhelmed by the sort of arguments which are sometimes reproduced in modern political meetings and legislative bodies. Some accused him of a deep design upon their liberties. Some declared that he had opposed the nation in its last quarrel, and was, in fact, no better than a traitor. One set knew him



to be unsound in his religious faith, and brought all the prejudices of superstition into the field against him. Others charged down upon him with a whole army of "illustrious ancestors," whose opinions, they said, were not like his. Others still there were who could see no objection to the man or the measure, but this was not the proper occasion—the time was out of joint. A portion of the crowd saw, in their much wisdom, that to quit hunting would enervate their frames and make them a race of cowards. Most powerful of all, and most profoundly wise in their own conceit, was the party who declared they would never consent to the enormous sacrifice of property required by such an innovation. They had invested a large capital in bows and arrows, and spears and traps, and knives; and these would all be useless if their future occupation was to consist in tilling the ground. There was one mighty man there—a blacksmith, who had gained great consequence, and earned innumerable skins, by making the weapons which were used in killing the beasts of the forest. He thought his *craft* was in danger, and he objected to agriculture for the same reason that Demetrius, the silversmith, afterward opposed Christianity. He put an end to all discussion by uttering a catch-word with just enough of no meaning in it to make his friends unanimous. He lifted up his big voice and cried out, "Great is Diana, the goddess of the bow and the patroness of hunters." The whole assembly in full chorus echoed the cry, and there was a great uproar. They would have stoned their prophet, for the sight of his meek countenance and the recollection of his blameless life exasperated their wrath; but no one proposed it, and he was suffered to escape.

This primitive apostle of agricultural science was defeated. He died in the melancholy belief that his people were destined to remain forever in barbarism. But not so. A truth had been spoken; and truth can never die. It had gone down in the shock of the first encounter with falsehood, but it was not crushed. Agriculture found an efficient champion where such a thing could least have been expected. At the great meeting under the trees there was a little girl, whose parents had both died of starvation, and her two brothers had perished in the pestilence which followed the famine. Hunger and its concomitants had carried away every relative she ever had. She was gifted by nature with a quick intellect and a kind heart; and her lonely condition had made her thoughtful and wise above her years. She listened to the words of the sage with beaming eye and flushed cheek, and lips parted in breathless interest. When she heard a proposal to furnish bread in abundance—bread at all times—bread which would always stay the ravages of famine, whether game was plenty or scarce—it roused every faculty of her mind. She knew the whole subject by heart as soon as she heard it explained. Henceforth she had neither eye nor ear for anything else. She gave herself up en-



tirely to the one great task of spreading agricultural science. Every day added to her own knowledge, and to the irresistible power with which she impressed it on other minds. She grew up with a lustrous beauty which seemed more than mortal. Her elocution, though gentle and persuasive, had all the vigor which springs from enthusiasm. She swayed those rude men with an influence they had never felt before. One after the other her countrymen threw away their bows and spears, and, with hoes in their hands, came and placed themselves under her tutelage. What she was unable to teach they learned from their own experiences mutually communicated. Soon all the hill-sides were covered with rich crops of waving grain, and the heavy timber began to disappear from the bottom-lands. Stately houses took the place of the mean hovels which the hunters had occupied. All the beasts of the forest which could be made useful to man were domesticated. The wild boar was captured and tamed for the sake of his flesh; the sheep submitted to the shearer; the ox bowed his shoulder to the yoke; and the mouth of the horse became acquainted with the bridle-bit. The wild fruits were transplanted into gardens and orchards, and were totally changed under the influence of a careful culture. The sour grape became a delicate luxury; the useless crab grew to be an apple; the sloe expanded into a delicious plum; and a nameless fruit, resembling the bitter almond, swelled out into a peach, with surpassing richness of flavor. New implements of husbandry were successively invented. The plow, the harrow, the sickle, and the scythe, each had its share in making the general prosperity greater.

Agriculture once established became the parent of other arts. Navigation, commerce, and manufactures added to their wealth. Cities rose up filled with a refined population. The nation grew strong and powerful, and spread its dominion far and wide. The name of a Greek became synonymous with all that was great among men. Their descendants were painters and sculptors, who furnished the models for every succeeding generation; poets, whose sublime strains have been feebly imitated ever since; philosophers and statesmen, whose words of wisdom will be heard with reverence to the end of time; warriors, whose deeds made Thermopylæ and Marathon the watchwords of the free; and orators—

“Who wielded the fierce democratie at will,  
Shook the arsenal, and fulminated over Greece.”

They were not unmindful of the benefactress who had given the first impulse to their high career. They assigned her a celestial parentage. Temples were erected to honor her. They believed that, though her home had long been fixed among the stars, she still presided over their affairs, and pleaded their cause in the senate of the gods. They painted her figure as they imagined it, all radiant with

supernatural beauty—her hand bearing the horn of plenty, and her head garlanded with ears of wheat. They worshiped her with all the fervor of idolatrous veneration, and for a long lapse of centuries they knew not that the labors of the farm were blessed and rewarded by a greater deity than Ceres. To this day we keep her memory alive by calling the most useful of agricultural products after her name—the *cereal* grains.

Such, we may suppose, was the transition state of agriculture—the passage from ignorance, barbarism, sloth, and hunger to systematic industry, refinement, and plenty. It was only a beginning. It has been advancing somewhat ever since, though the arts which sprang from it have outgrown their parent. Numberless instruments for the saving of labor and time have been invented. Preparing the ground, sowing, harvesting, and thrashing may all be done now with machinery vastly improved. The character, nature, and value of many products are better understood. New breeds of stock are introduced. Chemistry analyzes every soil, and shows precisely what elements it needs to increase its fertility. Highly concentrated manures are imported from the most distant parts of the world, and others are manufactured at home, out of substances which, once, were not only wasted, but suffered to reek their offensive odors on the atmosphere, and poison the health of the people.

In the days of Augustus the fields of Italy (then the center of civilization) were cultivated with an instrument resembling what we call a shovel-plow, only it seems to have had no shovel. The immediate predecessor of the patent plow, in use at the present time, was not much better. Most of you remember it—"a low, long, rakish-looking craft," whose wooden mold-board had to be cleaned every ten rods, and its wrought-iron share and coulter taken to the blacksmith's shop at least once a week.

The most important improvements yet made in agriculture have never been adopted here. A simple fact will show how much they have done for another country. Mr. Malthus, one of the profoundest thinkers of his day, calculated that the population of England would increase so rapidly, supposing its natural growth to be unchecked, that at the end of a certain time the soil would not yield a subsistence for the half of the people. For the other half starvation was the only prospect, unless a merciful Providence would kindly send war, pestilence, and plague to thin them out, and reduce their numbers to a level with the quantity of food which they could produce. This dismal theory was believed by the foremost men in the world; and it would have been true, if the land had not afterward been cultivated with greater skill than before. But it turned out to be a total mistake. The population of England did increase as rapidly as Malthus predicted; but the agricultural products of the country have in-



creased in a ratio two hundred and fifty per cent greater than the population. The people who were to have been starved long ago, or else prematurely cut off by millions at a blow, are living better than ever, with two and a half times as much food for each individual as they had when that theory was announced.

With the system of cultivation practiced now in some parts of Europe, the soil of Pennsylvania could be made to support fifteen millions of persons. There are large regions in Scotland, naturally poorer than any land we have in this country, and under a sky far less genial than ours, covered all over with crops which the richest valleys in the West would not be ashamed of; and wheat is produced, bushel for bushel, at a less expense than it is here.

This is but the beginning of the end. All that has yet been done is as nothing compared to what may yet come. Hitherto agriculture has been traveling over rough roads in an old-fashioned, slow coach. She is about to take the railroad, and, with a mighty train of her sister arts, she will go sweeping along. Not being either a prophet, or the son of a prophet, I have no right to predict anything. But one of these days we may be startled by some grand discovery, which will burst upon the world like the light of a new sun. Very sober-minded men live in the hope of seeing such things. One of the most successful farmers in this State has declared his conviction that, before long, manures will be so concentrated that a man may carry out, in his pocket-handkerchief, what will enrich the land as much as a hundred wagon-loads would now. This is very extravagant, no doubt, and quite as foolish as it would have been thirty years ago to prophesy of railroads, telegraphs, or daguerreotypes. About fifteen years since a person, whose name I have forgotten, said that he knew how any plant, from the tallest forest-tree to the tiniest blade of grass, could be made to grow four times as fast as it does naturally, and with almost no additional trouble. The Government refused to buy his secret, though the most distinguished men at Washington, to whom it was confidentially revealed, certified their belief in it. If it be really true, it will be heard of again. It would be something to raise four crops a year instead of one. Actual experiments have repeatedly shown that a plant may be made to germinate, rise above the ground, unfold its leaves, and grow to maturity so rapidly that it seems to the beholder like magic. Electricity, I believe, is the stimulus used. A gentleman in England laid a wager that he could raise a dish of salad, fit for use, in less than three quarters of an hour from the moment when the seeds were deposited in the ground. He tried it, and won the bet. Professor Espy has proved, in a manner that admits of no denial, that even the weather may be controlled, and extensive rains be produced, by artificial means. It has been done, more than once, in our own State. In Florida, where the materials can be easily had,

it is no uncommon thing, in a dry time, for persons to get up showers at an hour's notice on their own private account. Perhaps such facts as these are more curious than important. I mention them merely to show that there is something to hope for in the future, not from these things only, but others as yet not dreamed of in your philosophy. These are but the shadows which coming events have cast before them. The wave which will bear us onward has not reached us. But we feel it swelling beneath us, and see its lofty crest in the distance. In a little while it will lift us nearer to the stars than we ever expected to be in this life.

But how are agricultural societies to help this cause? I answer, much, every way. No great change has ever been wrought in the habits of any people without a united effort. Political principles, moral reforms, religion itself, are spread only by societies. As a bundle of sticks tied together is stronger than any separate stick, so is the united effort of an organized body of men more powerful than any separate efforts which can be made by the individual members. When you have a building to raise, you do not invite your neighbors to come at different times and request each one to take a lift by himself. In that way they might break their backs without doing you any good. The building will never go up unless they all lift together. If agriculture is to be elevated, it can only be done by a simultaneous lift. At such a raising you can well afford to spend all the time that is required.

The emulation excited by such a society, though very important and useful in its effects, is the least of its advantages. The county societies are in communication with the State society, and with one another. A good thought might be made to travel among them almost as fast as the telegraph could carry it, and a humbug exposed by one need never trouble the rest. All the societies in the State are, in fact, but one; and you have the multiplied strength of all to aid you in any enterprise you wish to carry. But the great purpose they serve is seen in these periodical exhibitions. They are the best means ever yet invented of collecting the evidences and satisfying the people on the whole subject. The world is full of imposture. No man but a fool would change his mode of cultivation, or throw away his old implements for others, unless he *knew* that he was doing so for the better. How can he know unless he has an opportunity of examining? Seeing is believing. Here, all the successful experiments made in the whole county (and many of those made elsewhere) are annually brought together, and subjected to public inspection; and for each one of them you have the sensible and true avouch of your own eyes. It was well said, in an address delivered here about six months ago, that we come here not to hear arguments, but to see facts, and look at demonstrations.



I ought to remind you that the State society is not a mere voluntary association of private individuals, but a public institution established, protected, and guarded by law. Some of you may not know that the profits of its exhibitions have already made it rich. One of its officers told me, a few weeks ago, that it had about forty thousand dollars in its treasury. Forty thousand more were probably added last week at Philadelphia. It is proposed to invest this fund, or a portion of it, in the purchase of a large farm, and to establish a school there, at which scientific and practical agriculture will be fully taught; and I presume without any expense to the pupil, except the labor he bestows on the farm. Half a dozen such schools may be established in the course of the next ten years, and it will, perhaps, be your fault if you do not have one in this part of the State.

Every citizen has an interest in this institution—I mean the State society. You have a legal right to be represented in its councils, and should see that you are. I do not know, or believe, that it has yet been touched by any man who is not perfectly honest. Its active members are certainly far above suspicion. But its funds are swelling rapidly, and it seems very difficult in these times to have much treasure deposited anywhere so safely that thieves will not break through and steal. Somerset County—and every son that claims her for his birthplace or his abode may speak it with honest pride—has never produced a public defaulter, and her people never knowingly sanctioned an act of bad faith. From the highest to the lowest of her officers, every one, for sixty years, has settled a clean account. In the glory of this enviable distinction she stands almost alone. It is fit that such a county should be well represented wherever there is a common fund that needs watching.

There are some other topics which ought not to be overlooked on such an occasion as this. But I have already taxed your patience more than I intended.

The future of this great country is full of exciting hope. But it depends entirely on the tillers of the soil whether that hope shall be realized or not. The neglect to improve our agriculture will be followed by the decay of all else that we ought to cherish in morals and government, as well as in the arts. Mexico has gone all to pieces—the property of her people is the spoil of robbers, and their liberty the plaything of a tyrant—simply because her agriculture is half a century behind the age. But for this she would have had an independent and stable government to-day, and might have laughed to scorn the force we sent against her in the late war. A well-cultivated soil produces not only grains, grasses, and fruits, but another and far more precious crop—men—men who know their rights, and dare maintain them—a bold, honest, and intelligent people—the just pride and the sure defense of every nation.

On the other hand, it startles the imagination to think what we may become in a few years if we adopt the improvements already made, and keep pace with those which are yet to be. We have the grandest field to work upon that was ever opened to the industry of man. A territory is ours stretching through every variety of climate and soil, from the wheat-lands of New England, lying, for half the year, four feet deep in snow, to the orange-groves of Texas and New Mexico, where winter never comes—valleys of unbounded fertility—mountains filled with inexhaustible wealth—lakes that spread out with a sea-like expanse—rivers, which make those of Europe seem like brooklets in comparison—everything, in short, made on a scale of magnificent grandeur. The child may now be born whose old age will look upon the American people and see them three hundred millions strong. Suppose such a population, doubling itself every twenty-two years and a half—living under a government of equal laws—moving onward and upward with the energy which freedom alone can inspire—and aided by the highest science in making the most of their natural advantages. Who shall curb the career of such a country, or set a limit to its deep-founded strength? Milton himself never dreamed of a power so boundless, or a people so blessed, even in that enrapturing vision when he saw “a mighty and puissant nation, rousing herself like a strong man after sleep, and shaking her invincible locks,” or like an eagle “mewing her mighty youth, and kindling her undazzled eye at the full blaze of the midday beam; purging and unscaling her sight at the fountain itself of heavenly radiance.” The man who, with his senses open to the truth, would thwart such a destiny, or refuse his aid to accomplish it, is a traitor, not to his country alone, but to the best interests and highest hopes of the human race.

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“RELIGIOUS LIBERTY.” AN ADDRESS TO THE PHRENAKOSMIAN SOCIETY OF PENNSYLVANIA COLLEGE, DELIVERED AT THE ANNUAL COMMENCEMENT, SEPTEMBER 17, 1856.

GENTLEMEN: I will call what I propose to address you upon, “Religious Liberty,” using that designation for lack of a better one. I will try to give a reason why the Government should be impartial between persons professing different creeds; and point out (briefly and imperfectly, of course) some of the evils which might result from any exercise of the civil power in matters of conscience.

This is a subject on which we are so unanimously orthodox, that I shall be in no danger of shocking anybody’s prejudices by speaking



the truth. If there be any errors among us (and on minor points it is possible there may be), they will easily be corrected by reference to certain fundamental principles which we *all* acknowledge.

The importance of forming just sentiments on this subject in early life can hardly be overestimated. Without this no educated man can perform the duties he owes to society. If he misunderstands the relations existing between the Church and the State, he can not possibly understand his own relations to either, and the chances are that he will be unfaithful to both. History is filled with examples of men who have belittled characters otherwise very great, and defeated all the high purposes of their mission to the world, simply by narrowness of soul in this one particular.

We habitually use certain words and phrases, imported from the other side of the water, which are calculated to mislead us. One of these is the word *toleration*, as applied to matters of faith. It implies that we derive whatever religious freedom we have from the concessions of the government; that the king in a monarchy, and the majority of the people in a republic, *permit* those who differ from them to live unmolested. This notion is wholly untrue. It is not a political privilege, but a natural, absolute, and indefeasible right, which human government may protect but can not either give or withhold. If we are permitted to enjoy it, our thanks are due, not to any popular majority, but to Him who gave us being.

“*Deus nobis hæc otia fecit.*”

Again, we hear it continually said, by the wisest men among us, that Christianity is part of our common law. No one has ever attempted to explain how this is to be understood. The law and the gospel are, in fact, wholly dissimilar in nature and essence, in origin, operation, and object; as different as the purity of the one must necessarily be from the coarse and vulgar machinery of the other; so different, that they never can be mingled together without corrupting both. Christianity, they tell us, is a *part* of our law; that is, we have adopted the rules of the divine Lawgiver to regulate our civil conduct, but, finding them very defective, we have made certain valuable additions. The Connecticut settlers resolved that they would live according to the laws of God, until they had time to make better. So we profess to have taken a system formed in the councils of Omniscience, which came from the hands of its Author round and perfect like a star; filled with all forms of moral beauty, and radiant with miracles of light; and we boast that we have adopted this system with such amendments as our superior wisdom has found it necessary to make. The proposition is blasphemous; and every Christian man should frown upon it.

We have merely quoted this maxim from the English judges, and gone on repeating it ever since, without inquiring whether it was true or false. It never was true, even in England, in any just sense of the word ; but it was not there, as it is here, a dead letter ; for in the evil days of that nation it had a bloody and a terrible meaning. What the king and Parliament, and a favored portion of the priesthood, chose to call Christianity, was a part of *their* law enforced with the utmost severity. But Christianity, surrounding itself with the corporal terrors of the fire, the gibbet, and the pillory, was as different as possible, in its whole spirit, from the pure and peaceable system first taught on the shores of Galilee. It was readily recognized by those persons whose interests it served, or whose passions it gratified ; but not by those who suffered under it. The bishop, fattening on tithes, thought that law and religion were convertible terms ; but the peasant felt that they were united in robbing labor of the bread it had earned. When Bonner used the law for the destruction of heretics, he pronounced it most Christian ; but the youngest of John Rogers's nine small children could have told him, by instinct, that it was devilish. Cranmer, while he was burning his enemies, thought that English law and true religion meant one and the same thing ; but he probably changed his opinion when it came his own turn to be roasted under that same law. The maxim that Christianity is part of the law was enunciated by Jeffreys, and other judges like him, with savage exultation, and with its sanction they rolled their garments in blood ; but Bunyan, confined fourteen years in prison, or Baxter, whipped at the cart's tail, could see in such law nothing like the Christianity of the "Pilgrim's Progress," or the "Saint's Rest."

The manifest object of the men who framed the institutions of this country, was to have a *State without religion*, and a *Church without politics*—that is to say, they meant that one should never be used as an engine for any purpose of the other, and that no man's rights in one should be tested by his opinions about the other. As the Church takes no note of men's political differences, so the State looks with equal eye on all the modes of religious faith. The Church may give her preferment to a Tory, and the State may be served by a heretic. Our fathers seem to have been perfectly sincere in their belief that the members of the Church would be more patriotic, and the citizens of the State more religious, by keeping their respective functions entirely separate. For that reason they built up a wall of complete and perfect partition between the two.

Their theory was one of absolute and unlimited freedom—a freedom "as broad and general as the casing air." It was their aim to take away every possible pretense which could be made by any human being to erect himself into a tribunal for the purpose of deciding matters supposed to be at issue between his fellow-creatures and their



God. They thought they had succeeded in guarding the rights of conscience so that no majority would ever invade them. They gave to Bigotry no possible chance for thrusting herself into civil affairs without doing so in flat rebellion to the Constitution.

This liberty to think and do what they please extends to all manner of wrong-headed people, so long as they do not interfere with the rights of others. The widest departure from the faith of the majority is permitted as fully as the most trifling difference of opinion. The Baptist may safely confess his belief in immersion, and the Quaker, with equal impunity, may disregard all outward forms. The Catholic may celebrate the mass, the Jew may eat the passover, and even the Mohammedan may turn his face toward Mecca when he prays. Some very good men are disgusted at a liberality so excessive that it stands neutral between the purest truth and the grossest error. Their righteous souls are vexed from day to day by the fact that their Government is such a Gallio as to "care for none of these things." If it be wrong, it can not now be mended. For those who are not content with it there is no help, except in emigrating to some place where persecution is not forbidden; and, even then, their comfort may depend very much on whether they are permitted to inflict the persecution, or compelled to suffer it. A British officer, just returned from India, was asked what he thought of lion-hunting. "The sport," said he, "is excellent as long as you are hunting the lion; but it gets rather disagreeable when the lion begins to hunt *you*."

Heterodox people in this country are protected not only from burning, hanging, maiming, and imprisonment, but it is provided that even political disabilities shall not be imposed on them for their erroneous faith. One sect shall have no advantage whatever over another. You shall not reward the true believers by giving them all the public employments, and punish heretics by a total exclusion. There shall be no religious test as a qualification for office. Make what other test you please. Exclude a man, if you like, for his political sentiments, or his moral conduct, for his wealth or his poverty, for his youth or his age; make war on him for the color of his hair, the length of his legs, or the shape of his nose. But let him alone about his religion: that is consecrated ground; that is a point on which the Constitution has refused to trust you with one particle of power; and wisely, too, for mortal men are not fit to be trusted with such power; they have never had it without abusing it grossly.

These obligations can not be judicially enforced. A private citizen can not be indicted for violating the Constitution; perhaps not even for a conspiracy to violate it. If he swears to support it, the oath is promissory, and therefore to break it is not legal perjury. It is only for gross, willful, and dishonest abuse of power that even a public officer can be impeached. The penalties of treason are never

incurred except by those who levy actual war against the Government, or adhere to a foreign enemy. Our fundamental law is a series of rules without any sanction, except in the forum of the conscience. Those citizens, therefore (if there be any such), who have no conscience, no sense of duty, and no shame, may disregard it as much as they please, without any fear of the penitentiary or the halter. But the fear of punishment is not necessary to make a true man faithful to the Constitution that guards his rights, and, if he swears to support it, he will keep his oath at all events.

If you should happen to be convinced (as you probably never will be, for no man can prove it) that this prohibition of a religious test is addressed only to the Legislature, and not to the people or their appointing agents, the question will then arise, Whether it is right to evade the command by any sort of indirection? There are men—perhaps not so many as there were a short time ago—who consider it altogether unlawful to effect a prohibited purpose, even by means which are not specifically forbidden. It is impossible to regard that morality as sound which would trifle and palter with the great principle embodied in a fundamental law whenever it can be done without violating the letter. An American citizen, who is not willing to support his government, as a sincere and earnest man supports what he loves and believes in, should renounce his allegiance, and wage against it a war of open hostility. It is better and braver to batter down the wall than to introduce the enemy by means of a wooden horse. Dolon was no friend of Troy any more than Ajax or Achilles; and you will agree with me in saying that he was an infinitely meaner man. When the foe reaches your citadel, no matter how he gets there, you may sing "*Fuit Ilium!*" for the glories of your empire will have passed away.

The establishment of religious freedom in America was, to some extent, a necessary consequence of the time and circumstances in which the country was settled. All the colonies were founded during the seventeenth century, and that was precisely the time when persecution was committing its most frightful ravages in Europe. The savage cruelty with which the contest of opinion was carried on by all parties, the judicial murders and the wholesale slaughters which marked the pathway of political power, are the saddest pages in the history of the human race. Bigotry rode rampant and red over all lands. In the fairest portions of France the whole population was suddenly and treacherously put to death or scattered abroad in wild dismay, like flocks of sheep attacked by the wolves. Philip II, in a decree of three lines, pronounced the doom of death on three millions of innocent persons in Holland; and that doom was executed with remorseless rigor as rapidly as the Duke of Alva, with a large army, could execute it, in a country already subjugated and helpless. The



fields of Germany were saturated with blood; every one of her great cities was a burned and blackened waste; two thirds of her people, men, women, and children, fell beneath the scourge. The best and bravest of Ireland were murdered three times over, and nearly every acre in the island was confiscated as often. The adherents of the two leading forms of Christianity were not the only parties to the strife. In England and Scotland, as well as in Germany and Switzerland, the people lashed themselves into a frenzy on still narrower questions. Prelatists and Presbyterians, Baptists, Covenanters, and Muggletonians, were convulsing the public mind with disputes between themselves. They committed on one another every form of legalized murder, and all varieties of atrocious cruelty. Burning, beheading, and hanging, as well as imprisonment, branding, and maiming, were in universal fashion. Men of the most fervent piety, the highest talents, and the most blameless lives, suffered inflictions so cruel and so ignominious, that, even at this distance of time, they can not be thought of without unspeakable indignation.

It was from these scenes of terror, conflagration, blood, and tears, that the earliest settlers of America fled. Most of them had suffered more or less for their faith, and all of them ought to have known that justice and sound policy were both in favor of free conscience. But this proposition, plain as it seems to us, was then very generally repudiated. The intellect, indeed, comprehends it readily enough, but in all ages the *heart* of man has learned it slowly and reluctantly. It is, therefore, no matter of surprise that some of the colonial rulers were almost as blind and ferocious as the oppressors they had left behind. But among them were three immortal names that will be venerated as long as the earth contains one friend of human liberty. These were Cecilius Calvert, William Penn, and Roger Williams—a Catholic, a Quaker, and a Baptist. There was no prince or statesman in all Europe that was worthy to stoop down and unloose the latchet of their shoes. Theirs was the greatest improvement in the science of government that was ever made. It was a new era of peace on earth and good-will to man, fit to be celebrated on the harps of angels. You may talk of other compromises; but the greatest compromise of all was that by which the fighting sects agreed to disarm and cease their barbarous hostility. The great men I have named were not only *our* benefactors, but the profoundest gratitude is due to their memory from the whole human race. Their example has shamed the civilized world, if not into freedom, at least into peace.

Lord Baltimore was, in some respects, a most fortunate man. He was especially happy in having a father to lay out his great work, and a son of rare ability to carry it on. To have been the author of the first statute that ever was passed to secure entire freedom of conscience, gives him the most enviable place in the world's history. His

high qualities of mind and heart made him worthy of that pre-eminent distinction, as a single incident will show. A successful rebellion, organized by those whom he had sheltered from the persecution of one another, deprived him for a time of his power, and the first thing they did was to persecute the church to which he himself belonged. When he recovered his authority he must have been tempted to retaliate. But with a greatness of mind which never deserted him, and with a fidelity to his own convictions which nothing could shake, he reorganized his government upon its former basis of equal protection to all.

The last and the greatest of English historians—one whose skill in praising what he admires and depreciating what he dislikes is unsurpassed—has turned his powerful magnifying-glass upon William Penn; and he announces that he has discovered on that “bright particular star” some spots never seen before. It is said that a famous astronomer, once upon a time, surprised the scientific world by declaring that he had discerned an elephant in the moon; but, upon close examination, it was ascertained that the elephant supposed to be in the moon was only a fly in the philosopher’s telescope. It may be that there was a fly in the instrument through which Mr. Macaulay looked at the character of Penn; and it is shrewdly suspected that some such insect might have crept in there about the time when the Quakers voted against him at the Edinburgh election. Be that as it may, this assault upon Penn’s fame comes too late in the day. The judgment of the world has been pronounced upon him long ago; and his maligners have no right to a new trial now. It is in vain to say that the decision was based on defective evidence. No man of his time was better known. From his early youth to his old age he was a man of mark, and lived constantly in the eye of the public, surrounded by enemies ever ready to put the worst construction upon his conduct. He went through the furnace without the smell of fire on his garments, and left behind him a character for moral virtue on which malice itself could fix no stain. In the bloom of his youth; with all the freshness of health and hope upon his heart; when worldly ambition was spreading its most seductive allurements around him, he gave up rank, fortune, friends, and became an outcast from the house of his father for the sake of communion with a despised and persecuted sect. In obedience to his conscience, and without other possible motive, he suffered insult and scorn and imprisonment with a fortitude that would have honored a Christian martyr in any age. That he was a man of consummate ability is proved by all his public acts, speeches, and writings. Even the words which are reported to have fallen from him in private conversation were so fitly spoken that they are “like apples of gold set in pictures of silver.” With one consent the wise and the learned of all nations have agreed that, as a lawgiver, he was the greatest that ever founded a state in ancient or modern times.



He was not the very foremost, but he was *among* the foremost, to disclaim all power of coercion over the conscience. This alone, if he had done nothing else, would have marked the tallness of his intellectual stature; for, when the light of a new truth is dawning upon the world, its earliest rays are always shed upon the loftiest minds. He not only received this truth into his own heart, but he devoted himself with tireless energy to the propagation of it. Long before he turned his attention to the New World he traveled through Germany and Switzerland, scattering the seeds broadcast wherever he went. They fell upon good ground, and in time bore an abundant harvest. His visit there was long and vividly remembered by a people who were sick of strife, and longed for the peace which an impartial government alone could give. Years afterward, when they heard that the young Quaker, who had so felicitously explained the principles of civil and religious freedom, was become a sort of king beyond the Atlantic, an intense desire to join him pervaded all classes and sects. They rushed to the seaports by thousands; there was not shipping enough to carry them away; Continental Europe had never seen such an exodus before. The emigration from England and Ireland was almost equally great. Attracted by his fame, men came from all parts of the world, and came in such numbers that in fifteen years Pennsylvania was the richest and most populous of all the colonies, though some of the rest were nearly a hundred years older. Under the beneficent influence of Penn's institutions the various races, differing in religion, manners, and language, were blended into one homogeneous mass; and their mingled blood now flows in the veins of a population—let me say it proudly, for I can say it without the least fear of contradiction—a population better and wiser, truer-hearted, and clearer-minded, than any other that lives on the surface of this great globe. *Si monumentum queris, circumspice.* There is his monument—look around if you desire to see it. His name is inscribed on this mighty Commonwealth. Day by day it rises higher and stands more firmly on its broad foundation—and there it will stand forever—“*Sacred to the memory of William Penn.*” It is not possible that such a man can need any defense against one who charges him with a want of common integrity. If there be any character besides that of Washington which is beyond the reach of so paltry a slander, it is Penn's. That he was not habitually honest and upright is an historical proposition as absurd as it would be to say that Julius Cæsar was a coward, that Virgil had no poetic genius, or that Cicero could not speak Latin. Nay, he was something more than an honest man; he was a philanthropist, who gave all he had and all he was—time, talents, and fortune—to the service of mankind. The heir of a large estate, the founder of the greatest city in North America, the sole owner of more than sixty thousand square miles of land, he never spent a shilling in any vicious extrava-

gance, but his large-handed charities so exhausted his income that, in his old age, he was imprisoned for debt. He had the unlimited confidence of a monarch whose favor an unscrupulous man would have coined into uncounted heaps of gold ; but he left the court with his hands empty ; and whosoever says they were not clean as well as empty, knows not whereof he affirms. I say again that all attacks on such a character are vain, and all defense unnecessary. The settled, universal feeling of reverence for his memory will not be disturbed, or one whit diminished, by a doubtful accusation, fished up from the oblivion of a hundred and fifty years, no matter how attractive the rhetoric in which the writer of a partisan history may clothe it.

The other man of that illustrious triumvirate is also entitled to your special notice. Roger Williams was a hero in the highest sense of that much-abused word. Of all the men that ever mingled in the good fight for freedom of opinion, he carried the most glittering weapon, fought the hardest battle, and won the most brilliant triumph. Single-handed and alone, he strove against a tumultuous throng of enemies, who pressed upon him in front, and flank, and rear. And never yet was hero so magnanimous in victory, or in adversity so calmly steadfast to his cause. His character is invested with that peculiar interest which we all feel in a great injured man, whose merits are the glory, while the wrongs he suffered are the shame, of the times he lived in. His intellectual vision saw the truth at a glance, and, his honest heart accepting it without hesitation, pushed it at once to its ultimate consequences. His eloquence was remarkable for its clearness and fervor ; he had a steadiness of purpose which opposition only made firmer, and no dangers that ever thickened around him could tame the audacity of his courage. Thus gifted, he came to Massachusetts in the vigor of his early manhood, and immediately took up the defense of what he called the "sanctity of conscience." It would have been a safer employment to denounce Mohammedanism in any part of Turkey. Mary Fisher made a fair trial of both. She went to Boston and she went to Constantinople. She publicly administered to the Sultan and to the elders of the Puritan church the rebuke which, in her opinion, was needed by each ; and her report of the comparative treatment she received gives a decided preference to the Turks. The intrepid spirit of Williams, however, was not to be quelled ; his denunciation of tyranny became more unsparing in proportion as the threats against himself grew louder. Such a man could not fail to have friends among the people ; but those who wielded the political power and the ecclesiastical influence of the colony were against him in a compact body, and hated him with that bitter intensity of hatred which religious bigotry alone can inspire. At first they tried him in debate, but that was soon



ended ; for his irresistible logic went through and through their flimsy sophistry, as a battering-ram would go through a wall of pasteboard. It was not at all safe to silence him as they silenced Robinson, Mary Dyer, and others, by hanging him ; for his character was known and honored, and

“ . . . his virtues  
Would plead like angels, trumpet-tongued, against  
The deep damnation of his taking off.”

But they anxiously took counsel among themselves how they might destroy him without incurring a responsibility too great. They made a law on purpose to catch him : Whosoever would deny their right to punish men for having a creed different from theirs should be banished. They disfranchised a town for giving him shelter ; they confiscated the lands of a congregation for hearing him preach ; they maligned his character in every possible way ; they so poisoned the mind of his own wife that even she for a time deserted him. Then—when he was all alone—when every one who should have aided him was cowed into submission—when no friend dared to stand up beside him—when his life’s life had been lied away—then they set their human bloodhounds upon him, and drove him forth to perish in the wilderness. For fourteen weeks, in the bitter depth of winter, he knew not, as he himself declared, “ what bread or bed did mean.” But the Indians remembered him well as the bold, just man, who had more than once interposed himself between them and the wrongs meditated against them by the whites. His quick intellect had already caught their language, and he spoke it with a fluency which surprised and flattered them. Miantonomoh, the chief of the Narragansetts, received him with open arms, loved him like a brother to the last, and gave him a large tract of his country, including a beautiful island in the sea. There he became the founder and lawgiver of a new province, which was, in reality and in truth, an asylum for *all* who were oppressed.

It is impossible to give any just idea of this singular man (or his opponents either) without calling your attention to a subsequent fact. Not long afterward, Massachusetts was threatened by a danger which appalled the bravest of her defenders. The Indians were burning for vengeance. All the neighboring tribes, and those who dwelt in the far interior, were forming a league to exterminate the colony by an indiscriminate massacre of all ages and sexes. On the day when this terrible truth was realized at Boston, the name of Roger Williams trembled upon every lip. His influence could dissolve the league ; except him there was no power on earth to save them. But would he do it ? Strange to say, they never doubted for a moment that he would fly to their rescue. They had basely injured him ; but they

knew that Christianity had lifted him far above the vulgar feeling of revenge. It was perilous, too, to rush alone between the enraged savages and the victims of their wild wrath ; but in that noble nature there was no taint of selfishness—no touch of craven fear. The breathless messenger of the Massachusetts authorities reached him at his island home in a stormy winter's night. He heard the imploring appeal, and, without a word of reproach for all they had made him suffer, and without a moment of unnecessary delay, he girded up his loins and started on his dangerous mission. He reached the mainland in a crazy boat, and thence he bent his steps through the trackless forest to the camp of the Narragansetts, where the hostile chiefs had already assembled. They were fairly infuriated by his presence. His throat was not safe from their knives for a moment, protected though he was by the influence of Miantonomoh. Nevertheless, this bold apostle of brotherhood and peace stood up with his life in his hand, surrounded by raging savages, and, for three successive days, pleaded the cause of their enemies and his own with all the pathetic eloquence of which he was so great a master. He prevailed at last ; the league was dissolved ; and Massachusetts was saved.

It would be unjust to the memory of the "Pilgrim Fathers" not to mention what gratitude they bestowed on their illustrious benefactor. They showed it not in words but in actions. Somehow they got hold of his *fidus Achates*—his devoted and faithful friend Miantonomoh. Him they delivered up to a rival chief with the distinct and clear understanding that he was to be basely and brutally murdered ; and the deed was done before the eyes of their commissioners. A confederation of the New England colonies was formed for mutual protection against the savages, but they refused to admit Rhode Island, and thus did all that in them lay to expose Williams and his people to that very fate from which he had saved them by an act of heroic magnanimity, such as no other man in millions would have performed. They tried to extend their tyrannical jurisdiction over the free conscience of his province, and, to prevent it, he was compelled to cross the Atlantic and get a charter from the Parliament. When he returned he landed at Boston ; and, though the hearts of the common people leaped to the greeting of their great deliverer, his old persecutors scowled on him with all the malignity of former days.

Such was Roger Williams. How grandly his humane and generous spirit contrasts with his contemporaries of the opposite school, with their sour tempers and their evil passions nursed by habits of persecution ! History has painted no picture of manly virtue which stands out in such clear and beautiful relief from the gloomy background of a dark and bigoted age. The American who can hear his name without emotions of respect and gratitude, like the man



" . . . who hath no music in himself,  
Is fit for treason, stratagem, and spoils:  
Let no such man be trusted."

The principles of Williams, Calvert, and Penn are necessary, not less to the prosperity of the Church, than to the peace and safety of the State. The man who would enforce religious truth by penalties of any kind, is not only cruel and inhuman, but he is "a fool as gross as ever ignorance made drunk." He descends from his vantage-ground, disgraces his cause as well as himself, and makes his adversaries hug their errors with more affection than ever. The logic of blood is just as powerful for the wrong as it is for the right, and truth, in such a contest, is disarmed of her intrinsic and natural power. By a thousand arguments you can show that Christ was God, and Mohammed an impostor; but the rack will prove as much for one as the other. It is possible to convert the most obstinate misbeliever by an appeal to his reason, but what progress will you make by burning his church?

The experiment has been thoroughly tried both ways, with what success you know very well. When the Church had no sword but the sword of the Spirit; when her disciples knew nothing of persecution, except what they suffered, her influence was irresistible. But on the evil day when she joined herself to political power, her "invincible locks" were shorn away, and she was compassed round with danger and darkness. Christianity, like the oak, will thrive only in the open air. It grows and flourishes, and strikes its roots deep into the earth, and stretches its branches to the skies, and spreads them over the plain, while the free winds are permitted to play among its leaves, and the sunshine of heaven to settle on its head. But it never was meant for a hot-house plant. It withers and dies when placed under the forcing-glass and exposed to the stimulus of an artificial heat.

The Author of the Christian system has lent no sanction to any deed of hatred or violence which has been done in his name. When the prophet Elijah came out from the cave and stood on the mountain, there passed in succession an earthquake, a fire, and a mighty wind, but the Lord was not in either. After these had gone by, there came a still, small voice, and Elijah knew that the Lord was there. In the history of the Christian world we have seen the earthquake, produced by the encounter of nation with nation, the fire of legal persecution, and the windy storm of political disputation. It needs no inspired prophet to tell us that in none of these was there any sign of His presence, who rules in justice and mercy. If he is not heard in the still, small voice that speaks to the reason and the conscience, then are we without God in the world, and consequently without hope.

Let us not be self-complacent enough to suppose that we are in no danger of being tempted to repeat what others have done before us. This age is wiser than former times. We know more, but I am not sure that we feel any better. American, Republican, Democratic nature, is still human nature, and has its full share of old Adam. Everywhere and at all times the spirit of persecution is the most insidious as well as the most deadly foe to public tranquillity, safety, and peace. It may steal imperceptibly over the popular heart at any moment, for its approaches are always noiseless and rapid. There is nothing less alarming in infancy, nor nothing more terrible in maturity. Its first whisperings are as gentle and soft as the summer breeze, but its murmurs grow louder and stronger and wilder, until you have it in the crash and roar of the tempest. The whole heavens may be darkened to-morrow by a cloud which to-day is not bigger than a man's hand.

*Facilis descensus Averni.* If our judgments could once be obscured by a strong feeling of hatred and contempt for those who profess a false faith, how easy might it be to convince us that there is nothing either legally or morally wrong in using our numerical power to strip them of their share in the civil government! We do that, and then come slander and insult of the injured party, by way of excuse for the injury. Resistance—perhaps retaliation in some form or another—would almost certainly follow; and this would be an excuse for still further inflictions. The combat deepens every hour; our hatred grows stronger and more intense at every stage of the contest, until we are completely blinded by it; and

"Masterless passion sways us to the mood  
Of what it likes or loathes."

The final issue would be the enactment of inhuman laws to suppress the religion of the minority, or else inhuman outrages—riot, bloodshed, incendiarism—perpetrated in defiance of law. "You begin," said Roger Williams to his opponents at Boston, "you begin by reviling your erring brethren: you will end by taking their lives; for you are on a path where there is no halting-place." He knew the philosophy of the subject exactly. It is idle folly to let loose the war-dogs of religious bigotry, hiss them on their victims, and then expect them to be content with barking. It is their nature to tear the flesh, and mangle the limbs, and lap the life-blood; and if you desire them not to do so, keep them chained up.

Besides this natural tendency of the passions, the reason of the thing is altogether opposed to stopping after you begin. There is an argument in favor of killing heretics which you can never answer, except by totally denying all power to molest them. If it be our



mission to propagate religious truth, as we understand it, by punishing those who refuse to accept it, why do we trifle with the great work intrusted to our hands? If we are responsible for the faith of others as well as our own, how dare we allow the God of the universe to be mocked and insulted by a false worship? We know very well that such errors are not to be eradicated except by destroying all who believe them. Nothing but the most thorough work will crush them out. If such be the service that God requires of us, let us perform it as men who know that we are working under our great Taskmaster's eye. Subdue the sentiment that might make you revolt against duty. Gird every man his sword upon his thigh; go through the camp and slay every man his brother and his friend. Feed the eagles with the flesh of all who dare to misbelieve; give their roofs to the flames, and let not one stone of their churches remain upon another. This reasoning is perfectly sound, if you concede the premises. Once let go your hold upon the true doctrine of perfect equality, and logic, as well as passion, will carry you irresistibly to the other extreme.

The tendency of bigotry to run into wild extravagance is partly accounted for by its singular gullibility. Its capacity for swallowing falsehood is absolutely unlimited. The most monstrous calumnies that human mendacity ever forged were piled upon the primitive Christians at Rome, and were believed without a spark of evidence—nay, in the face of overwhelming evidence to the contrary—not merely by the unthinking multitude, but by such an historian as Tacitus, by such a philosopher as Pliny, by such a prince as Trajan. We have no account of any people more industrious, upright, and pure in their lives than the Vaudois, the Israel of the Alps, as their German historian has called them. Yet the French monarch and his ministers listened with greedy ears to the lies which accused them of the most disgusting vices and the most horrible crimes. The "Popish plot"—a transparent fabrication which any child might have seen through—for years kept the minds of the English people in a convulsion of terror and alarm. The accused parties were covered with a public infamy from which no proof of their innocence could relieve them, while the perjured informers—such men as Oates, Bedloe, and Dangerfield, the most loathsome of human beings—were caressed and fondled as the very darlings of the nation. If you find a man thoroughly saturated with bigotry and hate against any particular sect, you may readily make him believe that its members are all corrupt, its ministers the spies of some foreign enemy, its churches the depositories of hostile arms, and its female schools places where the most abandoned licentiousness is systematically taught. You need not trouble yourself to give him proofs, and you need not fear any counter-proofs—he will believe it anyhow. I know more than one sharp man who thinks that Charles Carroll was an enemy of American inde-

pendence, and I have heard the most implicit confidence in Maria Monk expressed by a statesman who aspires to the presidency.

This evil spirit of persecution is indeed very far from confining itself to the ignorant and depraved. It has often brutalized the kindest natures, and under its influence the man of genius drivels like an idiot. I think no one can read the writings of St. Francis Xavier without being touched by the deep tone of his personal piety, yet he was the author of that diabolical invention, the Spanish Inquisition. That Calvin was the profoundest thinker of his age everybody admits; to deny the sincerity of his devotion would be simply absurd; but his name is inseparably linked with one of the foulest murders that ever blackened the face of the sky. Even the matchless intellect of Milton was subdued to the service of the same demon. When all his faculties were roused in defense of free conscience, there was one class of his opponents that he gave up without hesitation to the sword and the fagot. The great heart which conceived all the glories of the "Paradise Lost," had no drop of pity in it for the sufferings of the Irish. The loftiest hymn of his praise was sung to the man who carried the "curse of Cromwell" through that devoted island.

It not only nourishes those violent passions which lead to bloodshed and tyranny, it is almost equally objectionable for its meaner vices of treachery and fraud. It seldom approaches you in fair hostility, with its weapon drawn and its visor up; it hides its hideous face under some plausible disguise, and surrounds itself with all the machinery of false pretenses. It takes its adversary by the beard and affectionately inquires, "Art thou in health, my brother?" while it stabs him under the fifth rib. Charles IX invited the leading Protestants of his kingdom to a royal wedding, and took such order for their entertainment during the night that their mangled and lifeless bodies were scattered next morning through all the streets of Paris. This and other outrages were committed on the absurd allegation that Protestants were not, and could not be, faithful subjects, or sound in their private morals. The statesmen of England, meanwhile, with a disregard of truth equally base, made the same accusation against Catholics, and on that hypocritical pretense compelled them, for more than a century, to groan under oppression compared to which the bondage of Egypt was mild and merciful.

It engenders dissimulation of another kind. It pays an enormous premium for hypocrisy, and crushes out all independence and truth from the hearts of the people. Sincerity, even when it clings to an erroneous faith, is the first of virtues. But the brave, true men, who would rather suffer than belie their honest convictions, are hunted down and sent to the stake, or at least are banished in disgrace from the public councils, while the knave or the coward, who is willing to profess whatever creed is safe or profitable, is rewarded for his base-



ness with influence, power, and place. Bigotry applies an infallible test to the merits of men. With unerring certainty she divides the chaff from the wheat, but the wheat she condemns to the unquenchable fire of her hatred, while the chaff is carefully stored away in her garner. Therefore it is that, when bigotry reigns, the public service is always crowded with the worst men. Hostility against an unpopular religion is easily simulated. When you make that a virtue, the infidel and the ribald scorner can be as virtuous as anybody. When that becomes a passport to the sovereign's favor, the state will be served, not by religious men, but by "hireling wolves, whose gospel is their maw."

It is useless to describe any further the features of this monstrous demon. It is the Moloch of the earth, who sits on his shrine up to the ears in blood, and compels the children of men "to pass through fire to his grim idol." It corrupts the morals, it pollutes the religion, it endangers the safety of any people who permit it to gain a foothold among them.

But we may safely felicitate ourselves upon one thing. Our establishment of perfect religious liberty and equality has not only given happiness and peace to ourselves, but it has revolutionized the sentiments of the Christian world. We have led the grandest reform that has ever been seen since the days of the apostles. England, under the admitted influence of our example, has, in a great measure, knocked away the shackles from the minds of her people. She has removed one political disability after another, until at last she welcomes men of every creed to her service. A Jew is sheriff of London, Catholics sit in her Parliament, and a Presbyterian was, not long ago, at the head of her Cabinet. France has made a progress still greater. No one there thinks of excluding a man from office on account of his religion. For many years the prime minister, who mainly wielded the power and patronage of the kingdom, was the zealous defender of a creed which the king and four fifths of the people rejected. Even the fund raised by taxation for purposes of religious instruction is distributed to preachers of the Protestant as well as the Catholic faith. In those parts of Germany where the religious wars were conducted with the greatest ferocity, the Catholic and the Protestant sit side by side at the same council board, and even worship alternately in the same churches. The inquisition has been abolished in Spain, and *auto-da-fés* are heard of no longer in Portugal. Each government in Europe still supports what it chooses to call the national faith, but offenses against the religion of the state are nowhere visited with those cruel and sanguinary punishments which used to disgrace the Christian name. The great light of religious freedom, which was seen at first only from the mountain-ranges of the intellectual world, has already illumined the hill-sides, and promises soon to expel the deep

darkness from the lowest valleys. May the time be speeded when the whole earth shall be bathed in its radiance !

That America should now give up the proud position she occupies in the front of the world's great march, and skulk back like a recreant into the rear, is a thought which can not enter an American mind without causing a blush of insupportable shame. She stands pledged to this principle in the face of the world—she has solemnly devoted herself to its championship—she has deliberately promised it, not only to her own people, but to all others who should fly to her for protection—and, if she breaks her faith, it will be such perfidy as never blackened the brow of any nation before.

To avert a calamity so grievous, and to prevent a disgrace so indelible, the country looks to her educated men. The unbroken and uncorrupted heart of the people will be always with you on the right side ; but you are the body-guard of freedom, and it is your special duty to carry her oriflamme in the van of every battle. Perhaps no dangerous service will be needed soon. You may safely sit still while your enemies merely talk against the equal rights of all the people. But if at any time hereafter, during the long lives which I hope you will all enjoy, some great combination should arise to stir up the bitter waters of sectarian strife, and to marshal ignorance, prejudice, and selfishness into a body compact enough to endanger the bulwarks of the Constitution, then let your flag stream out upon the wind !

“ . . . then stand you up,  
Shielded, and helmed, and weaponed with the truth,  
And drive before you into uttermost shame  
Those recreant caitiffs.”

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“POLITICAL PREACHING.”—REPLY TO DR. NEVIN.

YORK, July 25, 1866.

*To the Rev. Alfred Nevin, D. D. :*

MY DEAR SIR : Your letter addressed to me through the Philadelphia “*Evening Bulletin*” disappoints me, because I did not expect it to come in that way, and because it does not cover the subject in issue between us ; but, if I am silent, your friends will say, with some show of reason, that you have vindicated “political preaching” so triumphantly that all opposition is confounded. I must, therefore, speak freely in reply. In doing so, I mean to say nothing inconsistent with my great respect for your high character in the Church and in the world. The admirable style and temper of your own communication deserve to be imitated.



I fully concede the right you claim for clergymen to select their own themes and handle them as they please. You say truly that neither lawyers nor physicians, nor any other order of men, have the least authority to control you in these particulars. But you will not deny that this is a privilege which may be abused. You expressly admit that some clergymen *have* abused it, "*and, by doing so, did more than any other class of men to commence and continue the late rebellion.*" While, therefore, we can assert no power to dictate your conduct, much less to force you, we are surely not wrong when we *entreat* you to impose upon *yourselves* those restrictions which reason and revelation have shown to be necessary for the good of the Church and the safety of civil society.

I acknowledge that your commission is a very broad one. You must "declare the whole counsel of God," to the end that sinners may be convinced and converts built up in their most holy faith. Truth, justice, temperance, humility, mercy, peace, brotherly kindness, charity—the whole circle of the Christian virtues—must be assiduously taught to your hearers; and, if any of them be inclined to the opposite vices, you are to denounce them without fear, by private admonition, by open rebuke, or by a general delivery of the law which condemns them. You are not bound to pause in the performance of this duty because it may offend a powerful ruler or a strong political party. Nor should you shrink from it when bad men, for their own purposes, approve what you do. Elevate the moral character, enlighten the darkness, and purify the hearts of those who are under your spiritual charge at all hazards, for this is the work which your great Taskmaster has given you to do, and he will admit no excuse for neglecting it.

But this is precisely what the political preacher is *not* in the habit of doing. He directs the attention of his hearers away from their own sins to the sins—real or imputed—of other people. By teaching his congregation that they are better than other men, he fills their hearts with self-conceit, bigotry, spiritual pride, envy, hatred, malice, and all uncharitableness. Instead of the exhortation, which they need, to take the beam out of their own eye, he incites them to pluck the mote from their brother's. He does not tell them what they shall do to be saved, but he instructs them very carefully how they shall act for the destruction of others. He rouses and encourages to the utmost of his ability those brutal passions which result in riot, bloodshed, spoliation, civil war, and general corruption of morals.

You commit a grievous error in supposing that politics and religion are so mingled together that you can not preach one without introducing the other. Christ and his apostles kept them perfectly separate. They announced the great facts of the gospel to each individual whom they addressed. When these were accepted, the believer

was told to repent and be baptized for the remission of his sins, and afterward to regulate his own life by the rules of a pure and perfect morality. They expressed no preference for one form of government over another. They provoked no political revolutions, and they proposed no legal reforms. If they had done so, they would have flatly contradicted the declaration that Christ's kingdom was not of this world, and Christianity itself would have died out in half a century. But they accepted the relations which were created by human law, and exhorted their disciples to discharge faithfully the duties which arose out of them. Though the laws which defined the authority of husbands, parents, masters, and magistrates were as bad as human perversity could make them, yet the early Christians contented themselves with teaching moderation in the exercise of legal power, and uniformly inculcated the virtues of obedience and fidelity upon wives, children, slaves, and subjects. They joined in no clamors for or against any administration, but simply testified against sin before the only tribunal which Christ ever erected on earth—that is to say, the conscience of the sinner himself. The vice of political preaching was wholly unknown to the primitive Church.

It is true that Paul counseled obedience to the government of Nero, and I am aware that modern clergymen interpret his words as a justification of the doctrine that support of an existing administration is "part of their allegiance to God." Several synods and other ecclesiastical bodies have solemnly *resolved* something to that effect. But they forget that what Paul advised was simple submission, not active assistance, to Nero. The Christians of that day did not indorse his atrocities merely because he was "the administration duly placed in power." They did not go with him to the theatre, applaud his acting, or praise him in the churches when he kidnapped their brethren, set fire to a city, or desolated a province. Nor did they assist at his apotheosis after his death, or pronounce funeral sermons to show that he was greater than Scipio, more virtuous than Cato, and more eloquent than Cicero. Political preachers would have done this, but Paul and Peter did no such thing.

There is nothing in the Scriptures to justify the Church in applying its discipline to any member for offenses purely political, much less for his mere opinions or feelings on public affairs. The clergy are without authority, as they are often without fitness, to decide for their congregation what is right or what is wrong in the legislation of the country. They are not called or sent to propagate any kind of political doctrine. The Church and the State are entirely separate and distinct in their origin, their object, and the sphere of their action; insomuch that the organism of one can never be used for any purpose of the other without injury to both.

Do I, therefore, say that the Christian religion is to have no influ-



ence on the political destiny of man? Far from it. Notwithstanding the unfaithfulness of many professors, it has already changed the face of human society, and it will yet accomplish its mission by spreading peace, independence, truth, justice, and liberty, regulated by law, "from the sea to the uttermost ends of the earth." But this will be accomplished only by reforming and elevating the individuals of whom society is composed—not by exasperating communities against each other, not by any alliance with the governments of the world, not by any vulgar partnership with politicians to kill and plunder their enemies.

Every time you reform a bad man, and bring his character up to the standard of Christian morality, you make an addition, greater or less, to that righteousness which exalteth a nation, and subtract an equal sum from the sin which is a reproach to any people. Sometimes a single conversion is extremely important in its immediate effect upon the public interests of a whole nation. No doubt the acceptance of the truth by Dionysius, the Areopagite, had much to do in molding the subsequent laws and customs of Athens. The conversion of Constantine was followed by the instant abrogation of all laws which fettered the conscience. In the reign of Theodosius the people of Thessalonica rose against the Roman garrison and killed its commander. For this act of rebellion the emperor decreed against them the curse of an indiscriminate war, in which the guilty and the innocent were confounded together in one general slaughter. His spiritual "guide, philosopher, and friend" at the time was Ambrose, Archbishop of Milan, who boldly denounced his cruelty, refused to give him the sacrament, or even to administer it in his presence, compelled him to take his seat among the penitents on the portico of the church, and induced him to humble his diadem in the dust for eight months in succession. The conscience of the emperor was thoroughly awakened; his subsequent reign was distinguished by justice and mercy, the integrity of the empire was preserved in peace, and the great "Theodosian Code," the product of that bitter repentance, is still read and quoted for its admirable union of humanity and policy. Ambrose produced these consequences by acting in the true capacity of a Christian minister, for he reformed the criminal by a direct appeal to his own heart. A political preacher, in the same circumstances, would have inflamed the sanguinary passions of the monarch by exaggerating the treason of the Thessalonians, and counseling the military execution of all who presumed to sympathize in their sufferings.

You will see, I think, the distinction I would make. A gospel preacher addresses the conscience of his hearers for the honest purpose of converting them from the error of their ways—a political preacher speaks to one community, one party, or one sect, and his

theme is the wickedness of another. The latter effects no religious purposes whatever, but the chances are, ninety-nine in a hundred, that he excites the bad passions of those who are present, while he slanders the absent and undefended. Both classes of preachers frequently speak upon the same or similar subjects, but they do so with different objects and aims.

I will make my meaning more clear by taking your own illustrations. You believe in the first day of the week as a Sabbath, and, so believing, your duty undoubtedly is to exhort all persons under your charge to observe it strictly; but you have no right to preach a crusade against the Jews and Seventh-day Baptists, to get intolerant laws enacted against them for keeping Saturday as a day of rest. If drunkenness be a sin which easily besets your congregation, you may warn them against it, and, inasmuch as abstinence is always easier than moderation, you should advise them to taste not, touch not, and handle not; but your position gives you no authority to provoke violent hostilities against tavern-keepers, liquor-dealers, or distillers. If any of your hearers be ignorant or coarse enough to desire more wives than one apiece, you should certainly teach them that polygamy is the worst feature of Asiatic manners, inconsistent with Christianity, and dangerous to domestic happiness; but you can not lawfully urge them to carry fire and sword into the territory of the Mormons merely because some of the Mormons are in this respect less holy than you. If the holding of slaves or bond-servants be a practical question among the members of your church, I know of nothing which forbids you to teach whatever you conscientiously believe to be true on that subject. But in a community where slavery is not only unknown but impossible, why should any preacher make it the subject of his weekly vituperation? You do not improve the religion of the slaveholder by traducing his character, nor mend the spiritual condition of your own people by making them thirst for the blood of their fellow-men.

If any person, to whom the service of another is due by the laws of the State in which he lives, shall need your instructions to regulate his personal conduct toward the slave, you are bound, in the first place, to tell him that, as long as that relation exists, he should behave with the utmost humanity and kindness; for this you have the clear warrant of the apostolic example and precept. In dealing with such a person you may go as much further as your own conscientious interpretation of the Bible will carry you. If you are sure that the divine law does, under all circumstances, make the mere existence of such a relation sinful on the part of the master, you should induce him to dissolve it by the immediate emancipation of his slaves; for that is truth to you which you believe to be true. But where is the authority for preaching hatred of those who understand the Scripture differently? What privilege can you show for exciting servile insur-



rection? Who gave you the right to say that John Brown was better than any other thief or murderer, merely because his crimes were committed against pro-slavery men?

I think the minister, in his pulpit discourses, is forbidden to touch at all upon that class of subjects which are purely political; such, for instance, as the banking law, tariff, railroad charters, State rights, the naturalization laws, and negro suffrage. These are questions of mere political expediency; religion takes no cognizance of them; they come within the sole jurisdiction of the statesman; and the Church has no more right to take sides upon them than the civil government has to use its legislative, judicial, or executive power for the purpose of enforcing principles wholly religious.

In short, if I am not entirely mistaken, a Christian minister has no authority to preach upon any subjects except those in which divine revelation has given him an infallible rule of faith and practice; and, even upon them, he must speak always for the edification of his own hearers, "rightly dividing the word of truth," so as to lead them in the way of all righteousness. When he does more than this he goes beyond his commission, he becomes a scurvy politician, and his influence is altogether pernicious.

The use of the clerical office for the purpose of propagating political doctrines under any circumstances, or with any excuse, is, in my judgment, not only without authority, but it is the highest crime that can be committed against the government of God or man. Perhaps I ought not to make this broad assertion without giving some additional reasons for it.

In the first place, it is grossly dishonest. I employ you as a minister, pay your salary and build you a church, because I have confidence in your theological doctrines, but you may be at the same time wholly unfit for my political leader. Now, you are guilty of a base fraud upon me if, instead of preaching religion, you take advantage of the position I have given you to ventilate your crude and ignorant notions on State affairs. I have asked for bread, and you give me a stone; instead of the fish I bargained for, you put into my hands a serpent that stings and poisons me.

It destroys the unity of the Church. There is no room for rational dispute about the great truths of Christianity, but men will never agree upon political subjects, for human government is at best but a compromise of selfish interests and conflicting passions. When you mix the two together you break the Church into fragments, and, instead of "one Lord, one faith, and one baptism," you create a thousand warring sects, and substitute the proverbial bitterness of the *odium theologicum* for the "charity which thinketh no evil."

No one will deny that the union of Church and state is always the cause of bad government, perverted religion, and corrupt morals. I

do not mean merely that legal union which exists in European countries. That is bad enough; but you have less common-sense than I give you credit for, if you do not see that this adulterous connection assumes its most polluting form when the Church is voluntarily prostituted by her own ministers to a political party in a popular government.

The evil influence of such connections upon Church and state is easily accounted for. Both of them in combination will do what either would recoil from if standing alone. A politician, backed by the promise of the clergy to sustain him, can safely defy honesty and trample upon the law, for, do what he may, he is assured of a clerical support here and of heaven hereafter. The clergy, on the other hand, and those who are under their influence, easily acquire the habit of praising indiscriminately whatever is done by their public men. Acting and reacting on one another, they go down together in the direction of the pit that is bottomless, and both are found to have "a strange alacrity at sinking."

No man can serve two masters faithfully, for he must hate one if he loves the other. A minister who admires and follows such men as those who have lately ruled and ruined this country must necessarily despise the character of Christ. If he glorifies the cruelty, rapacity, and falsehood of his party leaders, he is compelled, by an inflexible law of human nature, to "deny the Lord who bought him."

The experience of fifteen centuries proves that political preachers are the great curse of the world. More than half the bloody wars which, at different periods, have desolated Christendom, were produced by their direct instigation; and, wherever they have thrust themselves into a contest commenced by others, they always envionomed the strife, and made it more cruel, savage, and uncompromising. The religious wars, so called, had nothing religious about them except that they were hissed up by the clergy. Look back and see if this be not true.

The Arian controversy (the first great schism) was followed by wars in which millions of lives were lost. Do you suppose the real quarrel was for the insertion or omission of *filioque* in that part of the creed which describes the procession of the Holy Ghost? Did a *homoiousian* slaughter his brother because he was a *homoiousian*? No, it was not the difference of a diphthong, but the plunder of an empire that they fought for. It was the politics of the Church, not her religion, that infuriated the parties, and converted men into demons.

The Thirty Years' War in Germany is often supposed to have been a fair, stand-up fight between the two leading forms of Christianity. It was not so. The religious difference was the false pretense of the political preachers for the promotion of their own schemes. There was not a sane man on all the continent who would have felt himself im-



pelled by motives merely religious to murder his neighbor for believing or disbelieving in transubstantiation. If proof of this were wanting, it might be found in the fact that, long before the war ended, the sectarian cries were abandoned, and Catholics, as well as Protestants, were fighting on both sides.

It is utterly impossible to believe that the clergy of England and Scotland, if they had not been politicians, would have thought of waging bloody wars to settle questions of election and reprobation, fate, foreknowledge, free-will, and other points of metaphysical theology. Nor would they, apart from their politics, have encouraged and committed the other horrid crimes of which they were guilty in the name of religion.

Can you think that the Irish were invaded, and conquered, and oppressed, and murdered, and robbed for centuries, merely because the English loved and believed in the Protestant religion? I suppose you know that those brutal atrocities were carried on for the purpose of giving to political preachers in England possession of the churches, cathedrals, glebe-lands, and tithes which belonged to the Irish Catholics. The soldier was also rewarded by confiscations and plunder. The Church and the state hunted in couples, and Ireland was the prey which they ran down together.

Coming to our own country, you find Massachusetts and Connecticut, in colonial times, under the sole domination of political preachers. Their treacherous wars upon the Indians for purposes wholly mercenary; their enslaving of white persons, as well as red ones, and selling them abroad, or "swapping them for blackamoors"; their whipping, imprisoning, and killing Quakers and Baptists for their conscientious opinions; and their base treatment of such men as Roger Williams and his friends, will mark their government through all time as one of the cruelest and meanest that ever existed.

Political preachers have not behaved any better since the Revolution than before. About the commencement of the present century they were busy in their vile vocation all over New England, and continued it for many years. The willful and deliberate slanders habitually uttered from the pulpit against Jefferson, Madison, and the friends who supported them, were a disgrace to human nature. The immediate effect of this was the Yankee plot to secede from the Union, followed by corrupt combinations with a foreign enemy to betray the liberties of the country. Its remoter consequences are seen in the shameless rapacity and bitter malignity which, even at this moment, are howling for the property and blood of an unarmed and defenseless people.

You and I both remember the political preaching which ushered in and supported the reign of the Know-Nothings, Blood-Tubs, and Plug-Uglies; when Maria Monk was a saint, and Joe Barker was

mayor of Pittsburg; when pulpits resounded every Sunday with the most injurious falsehoods against Catholics; when the public mind was debauched by the inculcation of hypocrisy and deception; when ministers met their political allies in sworn secrecy to plot against the rights of their fellow-citizens. You can not forget what came of this—riot, murder, church-burning, lawless violence all over the land, and the subjugation of several great States to the political rule of a party destitute alike of principle and capacity.

I could easily prove that those clerical politicians, who have tied their churches to the tail of the Abolition party, are criminal on a grander scale than any of their predecessors. But I forbear, partly because I have no time, and partly because it may, for aught I know, be a sore subject with you. I would not excite your wrath, but rather “provoke you to good works.”

Apart from the general subject there are two or three special ideas expressed in your letter from which I venture to dissent.

You think that, though a minister may speak from the pulpit on politics, he ought not to indicate what party he belongs to. It strikes me that, if he has a party, and wants to give it ecclesiastical aid or comfort, he should boldly avow himself to be what he is, so that all men may know him. Sincerity is the first of virtues. It is bad to be a wolf, but a wolf in sheep's clothing is infinitely worse.

You represent the Church as an unfinished structure, and the state as its scaffolding. I think the Church came perfect from the hand of its divine Architect—built upon a rock, established, finished, complete—and every one who comes into it by the right door will find a mansion prepared for him. It needs no scaffold. Its founder refused all connection with human governments for scaffolding or any other purpose.

You say (in substance) that, without sometimes taking political subjects, a minister is in danger of falling into a “vague, indefinite, and non-committal style,” which will do no good, and bring him no respect. The gospel is not vague, indefinite, or non-committal upon the subjects of which it takes jurisdiction, and upon them you may preach as loudly as you please. But I admit that in times of great public excitement—an important election or a civil war—men listen impatiently to the teachings of faith and repentance. A sermon which tells them to do justice, love mercy, and walk humbly before God, is not an entertainment to which they willingly invite themselves. At such a time a clergyman can vastly increase his personal consequence, and win golden opinions from his audience, by pampering their passions with a highly seasoned discourse on politics. The temptation to gratify them often becomes too strong for the virtue of the preacher. I fear that you yourself are yielding to it. As a mere layman I have no right to advise a doctor of divinity, but I hope I am



not over-presumptuous when I warn you against this specious allure-ment of Satan. All thoughts of putting the gospel aside because it does not suit the depraved tastes of the day, and making political harangues to win popularity in a bad world, should be sternly trampled down as the suggestions of that Evil One "who was a liar and a murderer from the beginning."

Faithfully yours, etc.,

J. S. BLACK.

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#### ANSWER TO INGERSOLL.

"Gratiano speaks an infinite deal of nothing, more than any man in all Venice; his reasons are as two grains of wheat hid in two bushels of chaff; you shall seek all day ere you find them; and, when you have them, they are not worth the search."—*Merchant of Venice*.

THE request to answer the foregoing paper comes to me, not in the form but with the effect of a challenge, which I can not decline without seeming to acknowledge that the religion of the civilized world is an absurd superstition, propagated by impostors, professed by hypocrites, and believed only by credulous dupes.

But why should I, an unlearned and unauthorized layman, be placed in such a predicament? The explanation is easy enough. This is no business of the priests. Their prescribed duty is to preach the word, in the full assurance that it will commend itself to all good and honest hearts by its own manifest veracity and the singular purity of its precepts. They can not afford to turn away from their proper work, and leave willing hearers uninstructed, while they wrangle in vain with a predetermined opponent. They were warned to expect slander, indignity, and insult, and these are among the evils which they must not resist.

It will be seen that I am assuming no clerical function. I am not out on the forlorn hope of converting Mr. Ingersoll. I am no preacher exhorting a sinner to leave the seat of the scornful and come up to the bench of the penitents. My duty is more analogous to that of the policeman, who would silence a rude disturber of the congregation by telling him that his clamor is false, and his conduct an offense against public decency.

Nor is the Church in any danger which calls for the special vigilance of its servants. Mr. Ingersoll thinks that the rock-founded faith of Christendom is giving way before his assaults; but he is grossly mistaken. The first sentence of his essay is a preposterous blunder. It is not true that "*a profound change* has taken place in

the world of *thought*," unless a more rapid spread of the gospel, and a more faithful observance of its moral principles, can be called so. Its truths are everywhere proclaimed with the power of sincere conviction, and accepted with devout reverence by uncounted multitudes of all classes. Solemn temples rise to its honor in the great cities; from every hill-top in the country you see the church-spire pointing toward heaven, and on Sunday all the paths that lead to it are crowded with worshipers. In nearly all families, parents teach their children that Christ is God, and his system of morality absolutely perfect. This belief lies so deep in the popular heart that, if every written record of it were destroyed to-day, the memory of millions could reproduce it to-morrow. Its earnestness is proved by its works. Wherever it goes it manifests itself in deeds of practical benevolence. It builds, not churches alone, but almshouses, hospitals, and asylums. It shelters the poor, feeds the hungry, visits the sick, consoles the afflicted, provides for the fatherless, comforts the heart of the widow, instructs the ignorant, reforms the vicious, and saves to the uttermost them that are ready to perish. To the common observer it does not look as if Christianity were making itself ready to be swallowed up by infidelity. Thus far, at least, the promise has been kept that "the gates of hell shall not prevail against it."

There is, to be sure, a change in the party hostile to religion—not "a *profound* change," but a change entirely superficial—which consists, not in *thought*, but merely in modes of expression and methods of attack. The bad classes of society always hated the doctrine and discipline which reproached their wickedness and frightened them by threats of punishment in another world. Aforetime they showed their contempt of divine authority only by their actions; but now, under new leadership, their enmity against God breaks out into articulate blasphemy. They assemble themselves together; they hear with passionate admiration the bold harangue which ridicules and defies the Maker of the universe; fiercely they rage against the Highest, and loudly they laugh, alike at the justice that condemns, and the mercy that offers to pardon them. The orator who relieves them by assurances of impunity, and tells them that no supreme authority has made any law to control them, is applauded to the echo, and paid a high price for his congenial labor; he pockets their money, and flatters himself that he is a great power, profoundly moving "the world of thought."

There is another totally false notion expressed in the opening paragraph, namely, that "they who know most of nature believe the least about theology." The truth is exactly the other way. The more clearly one sees "the grand procession of causes and effects," the more awful his reverence becomes for the author of the "sublime and unbroken" law which links them together. Not self-conceit and rebellious pride, but unspeakable humility, and a deep sense of the meas-



ureless distance between the Creator and the creature, fills the mind of him who looks with a rational spirit upon the works of the All-wise One. The heart of Newton repeats the solemn confession of David : "When I consider thy heavens, the work of thy fingers, the moon and the stars which thou hast ordained ; what is man that thou art mindful of him, or the son of man that thou visitest him ?" At the same time, the lamentable fact must be admitted that "a little learning is a dangerous thing" to some persons. The sciolist, with a mere smattering of physical knowledge, is apt to mistake himself for a philosopher, and, swelling with his own importance, he gives out, like Simon Magus, "that himself is some great one." His vanity becomes inflamed more and more, until he begins to think he knows all things. He takes every occasion to show his accomplishments by finding fault with the works of creation and Providence ; and this is an exercise in which he can not long continue without learning to disbelieve in any being greater than himself. It was to such a person, and not to the unpretending simpleton, that Solomon applied his often-quoted aphorism, "The fool hath said in his heart, there is no God." These are what Paul refers to as "vain babblings and the opposition of science, falsely so called" ; but they are perfectly powerless to stop or turn aside the great current of human thought on the subject of Christian theology. That majestic stream, supplied from a thousand unfailing fountains, rolls on and will roll forever.

*Labitur et labetur in omne volubilis ævum.*

Mr. Ingersoll is not, as some have estimated him, the most formidable enemy that Christianity has encountered since the time of Julian the Apostate. But he stands at the head of living infidels, "by merit raised to that bad eminence." His mental organization has the peculiar defects which fit him for such a place. He is all imagination and no discretion. He rises sometimes into a region of wild poetry, where he can color everything to suit himself. His motto well expresses the character of his argumentation—"mountains are as unstable as clouds": a fancy is as good as a fact, and a high-sounding period is rather better than a logical demonstration. His inordinate self-confidence makes him at once ferocious and fearless. He was a practical politician before he "took the stump" against Christianity, and at all times he has proved his capacity to "split the ears of the groundlings," and make the unskillful laugh. The article before us is the least objectionable of all his productions. Its style is higher, and better suited to the weight of the theme. Here the violence of his fierce invective is moderated ; his scurrility gives place to an attempt at sophistry less shocking if not more true ; and his coarse jokes are either excluded altogether, or else veiled in the decent obscurity of general terms. Such a paper from such a man, at a time like the present, is not wholly unworthy of a grave contradiction.

He makes certain charges which we answer by an explicit denial, and thus an issue is made, upon which, as a pleader would say, we "put ourselves upon the country." He avers that a certain "something called Christianity" is a false faith imposed on the world without evidence; that the facts it pretends to rest on are mere inventions; that its doctrines are pernicious; that its requirements are unreasonable; and that its sanctions are cruel. I deny all this, and assert, on the contrary, that its doctrines are divinely revealed; its fundamental facts incontestably proved; its morality perfectly free from all taint of error, and its influence most beneficent upon society in general, and upon all individuals who accept it and make it their rule of action.

How shall this be determined? Not by what we call divine revelation, for that would be begging the question; not by sentiment, taste, or temper, for these are as likely to be false as true; but by inductive reasoning from evidence, of which the value is to be measured according to those rules of logic which enlightened and just men everywhere have adopted to guide them in the search for truth. We can appeal only to that rational love of justice, and that detestation of falsehood, which fair-minded persons of good intelligence bring to the consideration of other important subjects when it becomes their duty to decide upon them. In short, I want a decision upon sound judicial principles.

Gibson, the great Chief-Justice of Pennsylvania, once said to certain skeptical friends of his: "Give Christianity a common-law trial; submit the evidence *pro* and *con* to an impartial jury under the direction of a competent court, and the verdict will assuredly be in its favor." This deliverance, coming from the most illustrious judge of his time, not at all given to expressions of sentimental piety, and quite incapable of speaking on any subject for mere effect, staggered the unbelief of those who heard it. I did not know him then, except by his great reputation for ability and integrity, but my thoughts were strongly influenced by his authority, and I learned to set a still higher value upon all his opinions when, in after-life, I was honored with his close and intimate friendship.

Let Christianity have a trial on Mr. Ingersoll's indictment, and give us a decision *secundum allegata et probata*. I will confine myself strictly to the record—that is to say, I will meet the accusations contained in this paper, and not those made elsewhere by him or others.

His first specification against Christianity is the belief of its disciples "that there is a personal God, the creator of the material universe." If God made the world it was a most stupendous miracle, and all miracles, according to Mr. Ingersoll's idea, are "the children of mendacity." To admit the one great miracle of creation would be



an admission that other miracles are at least probable, and that would ruin his whole case. But you can not catch the leviathan of atheism with a hook. The universe, he says, is natural—it came into being of its own accord; it made its own laws at the start, and afterward improved itself considerably by spontaneous evolution. It would be a mere waste of time and space to enumerate the proofs which show that the universe was created by a pre-existent and self-conscious Being, of power and wisdom to us inconceivable. Conviction of the fact (miraculous though it be) forces itself on every one whose mental faculties are healthy and tolerably well-balanced. The notion that all things owe their origin and their harmonious arrangement to the fortuitous concurrence of atoms is a kind of lunacy which very few men in these days are afflicted with. I hope I may safely assume it as certain that all, or nearly all, who read this page will have sense and reason enough to see for themselves that the plan of the universe could not have been designed without a Designer, or executed without a Maker.

But Mr. Ingersoll asserts that, at all events, this material world had not a good and beneficent creator; it is a bad, savage, cruel piece of work, with its pestilences, storms, earthquakes, and volcanoes; and man, with his liability to sickness, suffering, and death, is not a success, but, on the contrary, a failure. To defend the Creator of the world against an arraignment so foul as this would be almost as unbecoming as to make the accusation. We have neither jurisdiction nor capacity to rejudge the justice of God. Why man is made to fill his particular place in the scale of creation—a little lower than the angels, yet far above the brutes; not passionless and pure, like the former, nor mere machines, like the latter; able to stand, yet free to fall; knowing the right, and accountable for going wrong; gifted with reason, and impelled by self-love to exercise the faculty—these are questions on which we may have our speculative opinions, but knowledge is out of our reach. Meantime we do not discredit our mental independence by taking it for granted that the Supreme Being has done all things well. Our ignorance of the whole scheme makes us poor critics upon the small part that comes within our limited perceptions. Seeming defects in the structure of the world may be its most perfect ornament—all apparent harshness the tenderest of mercies—

“All discord, harmony not understood,  
All partial evil, universal good.”

But worse errors are imputed to God as moral ruler of the world than those charged against him as creator. He made man badly, but governed him worse; if the Jehovah of the Old Testament was not merely an imaginary being, then, according to Mr. Ingersoll, he was

a prejudiced, barbarous, criminal tyrant. We will see what ground he lays, if any, for these outrageous assertions.

Mainly, principally, first, and most important of all, is the unqualified assertion that the "moral code" which Jehovah gave to his people "is in many respects abhorrent to every good and tender man." Does Mr. Ingersoll know what he is talking about? The moral code of the Bible consists of certain immutable rules to govern the conduct of all men, at all times and all places, in their private and personal relations with one another. It is entirely separate and apart from the civil polity, the religious forms, the sanitary provisions, the police regulations, and the system of international law laid down for the special and exclusive observance of the Jewish people. This is a distinction which every intelligent man knows how to make. Has Mr. Ingersoll fallen into the egregious blunder of confounding these things? or, understanding the true sense of his words, is he rash and shameless enough to assert that the moral code of the Bible excites the abhorrence of good men? In fact and in truth, this moral code, which he reviles, instead of being abhorred, is entitled to, and has received, the profoundest respect of all honest and sensible persons. The second table of the Decalogue is a perfect compendium of those duties which every man owes to himself, his family, and his neighbor. In a few simple words, which he can commit to memory almost in a minute, it teaches him to purify his heart from covetousness; to live decently, to injure nobody in reputation, person, or property, and to give every one his own. By the poets, the prophets, and the sages of Israel, these great elements are expanded into a volume of minuter rules, so clear, so impressive, and yet so solemn and so lofty, that no pre-existing system of philosophy can compare with it for a moment. If this vain mortal is not blind with passion, he will see, upon reflection, that he has attacked the Old Testament precisely where it is the most impregnable.

Dismissing his groundless charge against the moral code, we come to his strictures on the civil government of the Jews, which he says was so bad and unjust that the Lawgiver by whom it was established must have been as savagely cruel as the Creator that made storms and pestilences; and the work of both was more worthy of a devil than a god. His language is recklessly bad, very defective in method, and altogether lacking in precision. But, apart from the ribaldry of it, which I do not feel myself bound to notice, I find four objections to the Jewish constitution—not more than four—which are definite enough to admit of an answer. These relate to the provisions of the Mosaic law on the subjects of—1. Blasphemy and idolatry; 2. War; 3. Slavery; 4. Polygamy. In these respects he pronounces the Jewish system not only unwise but criminally unjust.

Here let me call attention to the difficulty of reasoning about



justice with a man who has no acknowledged standard of right and wrong. What is justice? That which accords with law; and the supreme law is the will of God. But I am dealing with an adversary who does not admit that there is a God. Then for him there is no standard at all; one thing is as right as another; and all things are equally wrong. Without a sovereign ruler there is no law, and where there is no law there can be no transgression. It is the misfortune of the atheistic theory that it makes the moral world an anarchy; it refers all ethical questions to that confused tribunal where chaos sits as umpire and "by decision more embroils the fray." But through the whole of this cloudy paper there runs a vein of presumptuous egoism which says as plainly as words can speak it that the author holds *himself* to be the ultimate judge of all good and evil; what he approves is right, and what he dislikes is certainly wrong. Of course I concede nothing to a claim like that. I will not admit that the Jewish constitution is a thing to be condemned merely because he curses it. I appeal from his profane malediction to the conscience of men who have a rule to judge by. Such persons will readily see that his specific objections to the statesmanship which established the civil government of the Hebrew people are extremely shallow, and do not furnish the shade of an excuse for the indecency of his general abuse:

1. He regards the punishments inflicted for blasphemy and idolatry as being immoderately cruel. Considering them merely as religious offenses—as sins against God alone—I agree that civil law should notice them not at all. But sometimes they affect very injuriously certain social rights which it is the duty of the state to protect. Wantonly to shock the religious feelings of your neighbor is a grievous wrong. To utter blasphemy or obscenity in the presence of a Christian woman is hardly better than to strike her in the face. Still, neither policy nor justice requires them to be ranked among the highest crimes in a government constituted like ours. But things were wholly different under the Jewish theocracy, where God was the personal head of the state. There blasphemy was a breach of political allegiance; idolatry was an overt act of treason; to worship the gods of the hostile heathen was deserting to the public enemy, and giving him aid and comfort. These are crimes which every independent community has always punished with the utmost rigor. In our own very recent history they were repressed at the cost of more lives than Judea ever contained at any one time.

Mr. Ingersoll not only ignores these considerations, but he goes the length of calling God a religious persecutor and a tyrant because he does not encourage and reward the service and devotion paid by his enemies to the false gods of the pagan world. He professes to believe that all kinds of worship are equally meritorious, and should meet the same acceptance from the true God. It is almost incredible

that such drivel as this should be uttered by anybody. But Mr. Ingersoll not only expresses the thought plainly—he urges it with the most extravagant figures of his florid rhetoric. He quotes the first commandment, in which Jehovah claims for himself the exclusive worship of his people, and cites, in contrast, the promise put in the mouth of Brahma, that he will appropriate the worship of all gods to himself, and reward all worshipers alike. These passages being compared, he declares the first “a dungeon, where crawl the things begot of jealous slime”; the other, “great as the domed firmament, inlaid with suns.” Why is the living God, whom Christians believe to be the Lord of liberty and Father of lights, denounced as the keeper of a loathsome dungeon? Because he refuses to encourage and reward the worship of Mammon and Moloch, of Belial and Baal; of Bacchus, with its drunken orgies, and Venus, with its wanton obscenities; the bestial religion which degraded the soul of Egypt, and the “dark idolatries of alienated Judah,” polluted with the moral filth of all the nations round about. Let the reader decide whether this man, entertaining such sentiments and opinions, is fit to be a teacher, or at all likely to lead us in the way we should go.

2. Under the constitution which God provided for the Jews, they had, like every other nation, the war-making power. They could not have lived a day without it. The right to exist implied the right to repel, with all their strength, the opposing force which threatened their destruction. It is true, also, that in the exercise of this power they did not observe those rules of courtesy and humanity which have been adopted in modern times by civilized belligerents. Why? Because their enemies, being mere savages, did not understand, and would not practice, any rule whatever; and the Jews were bound *ex necessitate rei*—not merely justified by the *lex talionis*—to do as their enemies did. In your treatment of hostile barbarians you not only may lawfully, but must necessarily, adopt their mode of warfare. If they come to conquer you, they may be conquered by you; if they give no quarter, they are entitled to none; if the death of your whole population be their purpose, you may defeat it by exterminating theirs. This sufficiently answers the silly talk of atheists and semi-atheists about the warlike wickedness of the Jews.

But Mr. Ingersoll positively, and with the emphasis of supreme and all-sufficient authority, declares that “a war of conquest is simply murder.” He sustains this proposition by no argument founded in principle. He puts sentiment in place of law, and denounces aggressive fighting because it is offensive to his “tender and refined soul”: the atrocity of it is, therefore, proportioned to the sensibilities of his own heart. He proves war a desperately wicked thing by continually vaunting his own love for small children. Babes—sweet babes—the prattle of babes—are the subjects of his most pathetic



eloquence, and his idea of music is embodied in the commonplace expression of a Hindoo, that the lute is sweet only to those who have not heard the prattle of their own children. All this is very amiable in him, and the more so, perhaps, as these objects of his affection are the young ones of a race, in his opinion, miscreated by an evil-working chance. But his *philoprogenitiveness* proves nothing against Jew or Gentile, seeing that all have it in an equal degree, and those feel it most who make the least parade of it. Certainly it gives him no authority to malign the God who implanted it alike in the hearts of us all. But I admit that his benevolence becomes peculiar and ultra when it extends to beasts as well as babes. He is struck with horror by the sacrificial solemnities of the Jewish religion. "The killing of those animals was," he says, "a terrible system," a "shedding of innocent blood," "shocking to a refined and sensitive soul." There is such a depth of tenderness in this feeling, and such a splendor of refinement, that I give up without a struggle to the superiority of the man who merely professes it. A carnivorous American, full of beef and mutton, who mourns with indignant sorrow because bulls and goats were killed in Judea three thousand years ago, has reached the climax of sentimental goodness, and should be permitted to dictate on all questions of peace and war. Let Grotius, Vattel, and Puffendorf, as well as Moses and the prophets, hide their diminished heads.

But, to show how inefficacious, for all practical purposes, a mere sentiment is when substituted for a principle, it is only necessary to recollect that Mr. Ingersoll is himself a warrior who staid not behind the mighty men of his tribe when they gathered themselves together for a war of conquest. He took the lead of a regiment as eager as himself to spoil the Philistines, "and out he went a-coloneling." How many Amalekites, and Hittites, and Amorites he put to the edge of the sword, how many wives he widowed, or how many mothers he "un-babed," can not now be told. I do not even know how many droves of innocent oxen he condemned to the slaughter. But it is certain that his refined and tender soul took great pleasure in all the terrors with which the war was attended, and in all the hard oppressions which the conquered people were made to suffer afterward. I do not say that the war was either better or worse for his participation and approval. But if his own conduct (for which he professes neither penitence nor shame) was right, it was right on grounds which make it an inexcusable outrage to call the children of Israel savage criminals for carrying on wars of aggression to save the life of their government. These inconsistencies are the necessary consequence of having no rule of action, and no guide for the conscience. When a man throws away the golden metewand of the law which God has provided, and takes the elastic cord of feeling for his measure of righteousness, you can not tell from day to day what he will think or do.

3. But Jehovah permitted his chosen people to hold the captives they took in war or purchased from the heathen as servants for life. This was slavery, and Mr. Ingersoll declares that "in all civilized countries it is not only admitted, but it is passionately asserted, that slavery is, and always was, a hideous crime"; therefore he concludes that Jehovah was a criminal. This would be a *non sequitur*, even if the premises were true. But the premises are false; civilized countries have admitted no such thing. That slavery is a crime, under all circumstances and at all times, is a doctrine first started by the adherents of a political faction in this country less than forty years ago. They denounced God and Christ for not agreeing with them, in terms very similar to those used here by Mr. Ingersoll. But they did not constitute the civilized world; nor were they, if the truth must be told, a very respectable portion of it. Politically, they were successful; I need not say by what means, or with what effect upon the morals of the country. Doubtless Mr. Ingersoll gets a great advantage by invoking their passions and their interests to his aid, and he knows how to use it. I can only say that, whether American abolitionism was right or wrong under the circumstances in which we were placed, my faith and my reason both assure me that the infallible God proceeded upon good grounds when he authorized slavery in Judea. Subordination of inferiors to superiors is the groundwork of human society. All improvement of our race, in this world and the next, must come from obedience to some master better and wiser than ourselves. There can be no question that, when a Jew took a neighboring savage for his bond-servant, incorporated him into his family, tamed him, taught him to work, and gave him a knowledge of the true God, he conferred upon him a most beneficent boon.

4. Polygamy is another of his objections to the Mosaic constitution. Strange to say, it is not there. It is neither commanded nor prohibited; it is only discouraged. If Mr. Ingersoll were a statesman instead of a mere politician, he would see good and sufficient reasons for the forbearance to legislate directly upon the subject. It would be improper for me to set them forth here. He knows, probably, that the influence of the Christian Church alone, and without the aid of state enactments, has extirpated this bad feature of Asiatic manners wherever its doctrines were carried. As the Christian faith prevails in any community, in that proportion precisely marriage is consecrated to its true purpose, and all intercourse between the sexes refined and purified. Mr. Ingersoll got his own devotion to the principle of monogamy—his own respect for the highest type of female character—his own belief in the virtue of fidelity to one good wife—from the example and precept of his Christian parents. I speak confidently, because these are sentiments which do not grow in the heart of the natural man without being planted. Why, then, does he throw



polygamy into the face of the religion which abhors it? Because he is nothing if not political. The Mormons believe in polygamy, and the Mormons are unpopular. They are guilty of having not only many wives but much property, and, if a war could be hissed up against them, its fruits might be more "gaynefull pilladge than wee doe now conceyve of." It is a cunning manœuvre, this, of strengthening atheism by enlisting anti-Mormon rapacity against the God of the Christians. I can only protest against the use he would make of these and other political interests. It is not argument; it is mere stump oratory.

I think I have repelled all of Mr. Ingersoll's accusations against the Old Testament that are worth noticing, and I might stop here. But I will not close upon him without letting him see, at least, some part of the case on the other side.

I do not enumerate in detail the positive proofs which support the authenticity of the Hebrew Bible, though they are at hand in great abundance, because the evidence in support of the new dispensation will establish the verity of the old—the two being so connected together that if one is true the other can not be false.

When Jesus of Nazareth announced himself to be Christ, the Son of God, in Judea, many thousand persons who heard his words and saw his works believed in his divinity without hesitation. Since the morning of the creation nothing has occurred so wonderful as the rapidity with which this religion spread itself abroad. Men who were in the noon of life when Jesus was put to death as a malefactor lived to see him worshiped as God by organized bodies of believers in every province of the Roman Empire. In a few more years it took complete possession of the general mind, supplanted all other religions, and wrought a radical change in human society. It did this in the face of obstacles which, according to every human calculation, were insurmountable. It was antagonized by all the evil propensities, the sensual wickedness, and the vulgar crimes of the multitude, as well as the polished vices of the luxurious classes; and was most violently opposed even by those sentiments and habits of thought which were esteemed virtuous, such as patriotism and military heroism. It encountered not only the ignorance and superstition, but the learning and philosophy, the poetry, eloquence, and art of the time. Barbarism and civilization were alike its deadly enemies. The priesthood of every established religion, and the authority of every government, were arrayed against it. All these, combined together and roused to ferocious hostility, were overcome, not by the enticing words of man's wisdom, but by the simple presentation of a pure and peaceful doctrine, preached by obscure strangers at the daily peril of their lives. Is it Mr. Ingersoll's idea that this happened by chance, like the creation of the world? If not, there are but two other ways to account

for it: either the evidence by which the apostles were able to prove the supernatural origin of the gospel was overwhelming and irresistible, or else its propagation was provided for and carried on by the direct aid of the Divine Being himself. Between these two, infidelity may make its own choice.

Just here another dilemma presents its horns to our adversary. If Christianity was a human fabrication, its authors must have been either good men or bad. It is a moral impossibility—a mere contradiction in terms—to say that good, honest, and true men practiced a gross and willful deception upon the world. It is equally incredible that any combination of knaves, however base, would fraudulently concoct a religious system to denounce themselves, and to invoke the curse of God upon their own conduct. Men that love lies, love not such lies as that. Is there any way out of this difficulty, except by confessing that Christianity is what it purports to be—a divine revelation?

The acceptance of Christianity by a large portion of the generation contemporary with its Founder and his apostles was, under the circumstances, an adjudication as solemn and authoritative as mortal intelligence could pronounce. The record of that judgment has come down to us, accompanied by the depositions of the principal witnesses. In the course of eighteen centuries many efforts have been made to open the judgment or set it aside on the ground that the evidence was insufficient to support it. But on every rehearing the wisdom and virtue of mankind have reaffirmed it. And now comes Mr. Ingersoll, to try the experiment of another bold, bitter, and fierce reargument. I will present some of the considerations which would compel me, if I were a judge or juror in the cause, to decide it just as it was decided originally:

1. There is no good reason to doubt that the statements of the evangelists, as we have them now, are genuine. The multiplication of copies was a sufficient guarantee against any material alteration of the text. Mr. Ingersoll speaks of interpolations made by the fathers of the Church. All he knows and all he has ever heard on that subject is that some of the innumerable transcripts contained errors which were discovered and corrected. That simply proves the present integrity of the documents.

2. I call these statements *depositions*, because they are entitled to that kind of credence which we give to declarations made under oath—but in a much higher degree, for they are more than sworn to. They were made in the immediate prospect of death. Perhaps this would not affect the conscience of an atheist—neither would an oath—but these people manifestly believed in a judgment after death, before a God of truth, whose displeasure they feared above all things.

3. The witnesses could not have been mistaken. The nature of



the facts precluded the possibility of any delusion about them. For every averment they had "the sensible and true avouch of their own eyes" and ears. Besides, they were plain-thinking, sober, unimaginative men, who, unlike Mr. Ingersoll, always, under all circumstances, and especially in the presence of eternity, recognized the difference between mountains and clouds. It is inconceivable how any fact could be proved by evidence more conclusive than the statement of such persons, publicly given and steadfastly persisted in through every kind of persecution, imprisonment, and torture, to the last agonies of a lingering death.

4. Apart from these terrible tests, the more ordinary claims to credibility are not wanting. They were men of unimpeachable character. The most virulent enemies of the cause they spoke and died for have never suggested a reason for doubting their personal honesty. But there is affirmative proof that they and their fellow-disciples were held by those who knew them in the highest estimation for truthfulness. Wherever they made their report it was not only believed, but believed with a faith so implicit that thousands were ready at once to seal it with their blood.

5. The tone and temper of their narrative impress us with a sentiment of profound respect. It is an artless, unimpassioned, simple story. No argument, no rhetoric, no epithets, no praises of friends, no denunciation of enemies, no attempts at concealment. How strongly these qualities commend the testimony of a witness to the confidence of judge and jury is well known to all who have any experience in such matters.

6. The statements made by the evangelists are alike upon every important point, but are different in form and expression, some of them including details which the others omit. These variations make it perfectly certain that there could have been no previous concert between the witnesses, and that each spoke independently of the others, according to his own conscience and from his own knowledge. In considering the testimony of several witnesses to the same transaction, their substantial agreement upon the main facts, with circumstantial differences in the detail, is always regarded as the great characteristic of truth and honesty. There is no rule of evidence more universally adopted than this—none better sustained by general experience, or more immovably fixed in the good sense of mankind. Mr. Ingersoll himself admits the rule and concedes its soundness. The logical consequence of that admission is, that we are bound to take this evidence as incontestably true. But mark the infatuated perversity with which he seeks to evade it. He says that when we claim that the witnesses were inspired, the rule does not apply, because the witnesses then speak what is known to him who inspired them, and all must speak exactly the same, even to the minutest detail. Mr.

Ingersoll's notion of an inspired witness is that he is no witness at all, but an irresponsible medium who unconsciously and involuntarily raps out or writes down whatever he is prompted to say. But this is a false assumption, not countenanced or even suggested by anything contained in the Scriptures. The apostles and evangelists are expressly declared to be witnesses, in the proper sense of the word, called and sent to testify the truth according to their knowledge. If they had all told the same story in the same way, without variation, and accounted for its uniformity by declaring that they were inspired, and had spoken without knowing whether their words were true or false, where would have been their claim to credibility? But they testified what they knew; and here comes an infidel critic impugning their testimony because the impress of truth is stamped upon its face.

7. It does not appear that the statements of the evangelists were ever denied by any person who pretended to know the facts. Many there were in that age and afterward who resisted the belief that Jesus was the Christ, the Son of God, and only Saviour of man; but his wonderful works, the miraculous purity of his life, the unapproachable loftiness of his doctrines, his trial and condemnation by a judge who pronounced him innocent, his patient suffering, his death on the cross, and resurrection from the grave—of these not the faintest contradiction was attempted, if we except the false and feeble story which the elders and chief priests bribed the guard at the tomb to put in circulation.

8. What we call the fundamental truths of Christianity consist of great public events which are sufficiently established by history without special proof. The value of mere historical evidence increases according to the importance of the facts in question, their general notoriety, and the magnitude of their visible consequences. Cornwallis surrendered to Washington at Yorktown, and changed the destiny of Europe and America. Nobody would think of calling a witness or even citing an official report to prove it. Julius Caesar was assassinated. We do not need to prove that fact like an ordinary murder. He was master of the world, and his death was followed by a war with the conspirators, the battle at Philippi, the quarrel of the victorious triumvirs, Actium, and the permanent establishment of imperial government under Augustus. The life and character, the death and resurrection, of Jesus are just as visibly connected with events which even an infidel must admit to be of equal importance. The Church rose and armed herself in righteousness for conflict with the powers of darkness; innumerable multitudes of the best and wisest rallied to her standard and died in her cause; her enemies employed the coarse and vulgar machinery of human government against her, and her professors were brutally murdered in large numbers; her triumph was complete; the gods of Greece and Rome crumbled on their



altars; the world was revolutionized and human society was transformed. The course of these events, and a thousand others, which reach down to the present hour, received its first propulsion from the transcendent fact of Christ's crucifixion. Moreover, we find the memorial monuments of the original truth planted all along the way. The sacraments of baptism and the supper constantly point us back to the author and finisher of our faith. The mere historical evidence is for these reasons much stronger than what we have for other occurrences which are regarded as undeniable. When to this is added the cumulative evidence given directly and positively by eye-witnesses of irreproachable character, and wholly uncontradicted, the proof becomes so strong that the disbelief we hear of seems like a kind of insanity:

"It is the very error of the moon,  
Which comes more near the earth than she was wont,  
And makes men mad!"

From the facts established by this evidence, it follows irresistibly that the gospel has come to us from God. That silences all reasoning about the wisdom and justice of its doctrines, since it is impossible even to imagine that wrong can be done or commanded by that Sovereign Being whose will alone is the ultimate standard of all justice.

But Mr. Ingersoll is still dissatisfied. He raises objections as false, fleeting, and baseless as clouds, and insists that they are as stable as the mountains, whose everlasting foundations are laid by the hand of the Almighty. I will compress his propositions into plain words printed in *italics*, and, taking a look at his misty creations, let them roll away and vanish into air, one after another.

*Christianity offers eternal salvation as the reward of belief alone.* This is a misrepresentation simple and naked. No such doctrine is propounded in the Scriptures, or in the creed of any Christian church. On the contrary, it is distinctly taught that faith avails nothing without repentance, reformation, and newness of life.

*The mere failure to believe it is punished in hell.* I have never known any Christian man or woman to assert this. It is universally agreed that children too young to understand it do not need to believe it. And this exemption extends to adults who have never seen the evidence, or, from weakness of intellect, are incapable of weighing it. Lunatics and idiots are not in the least danger, and, for aught I know, this category may, by a stretch of God's mercy, include minds constitutionally sound, but with faculties so perverted by education, habit, or passion that they are incapable of reasoning. I sincerely hope that, upon this or some other principle, Mr. Ingersoll may escape the hell he talks about so much. But there is no direct promise to save him in spite of himself. The plan of redemption contains no express cove-

nant to pardon one who rejects it with scorn and hatred. Our hope for him rests upon the infinite compassion of that gracious Being who prayed on the cross for the insulting enemies who nailed him there.

*The mystery of the second birth is incomprehensible.* Christ established a new kingdom in the world, but not of it. Subjects were admitted to the privileges and protection of its government by a process equivalent to naturalization. To be born again, or regenerated, is to be naturalized. The words all mean the same thing. Does Mr. Ingersoll want to disgrace his own intellect by pretending that he can not see this simple analogy?

*The doctrine of the atonement is absurd, unjust, and immoral.* The plan of salvation, or any plan for the rescue of sinners from the legal operation of divine justice, could have been framed only in the councils of the Omniscient. Necessarily its heights and depths are not easily fathomed by finite intelligence. But the greatest, ablest, wisest, and most virtuous men that ever lived have given it their profoundest consideration, and found it to be not only authorized by revelation, but theoretically conformed to their best and highest conceptions of infinite goodness. Nevertheless, here is a rash and superficial man, without training or habits of reflection, who, upon a mere glance, declares that it "must be abandoned," because it *seems to him* "absurd, unjust, and immoral." I would not abridge his freedom of thought or speech, and the *argumentum ad verecundiam* would be lost upon him. Otherwise I might suggest that, when he finds all authority, human and divine, against him, he had better speak in a tone less arrogant.

*He does not comprehend how justice and mercy can be blended together in the plan of redemption, and therefore it can not be true.* A thing is not necessarily false because he does not understand it: he can not annihilate a principle or a fact by ignoring it. There are many truths in heaven and earth which no man can see through; for instance, the union of man's soul with his body is not only an unknowable but an unimaginable mystery. Is it therefore false that a connection does exist between matter and spirit?

*How, he asks, can the sufferings of an innocent person satisfy justice for the sins of the guilty?* This raises a metaphysical question, which it is not necessary or possible for me to discuss here. As matter of fact, Christ died that sinners might be reconciled to God, and in that sense he died for them—that is, to furnish them with the means of averting divine justice which their crimes had provoked.

*What, he again asks, would we think of a man who allowed another to die for a crime which he himself had committed?* I answer that a man who, by any contrivance, causes his own offense to be visited upon the head of an innocent person is unspeakably depraved.



But are Christians guilty of this baseness because they accept the blessings of an institution which their great benefactor died to establish? Loyalty to the King who has erected a most beneficent government for us at the cost of his life—fidelity to the Master who bought us with his blood—is not the fraudulent substitution of an innocent person in place of a criminal.

*The doctrine of non-resistance, forgiveness of injuries, reconciliation with enemies, as taught in the New Testament, is the child of weakness, degrading, and unjust.* This is the whole substance of a long, rambling diatribe, as incoherent as a sick man's dream. Christianity does not forbid the necessary defense of civil society, or the proper vindication of personal rights. But to cherish animosity, to thirst for mere revenge, to hoard up wrongs, real or fancied, and lie in wait for the chance of paying them back; to be impatient, unforgiving, malicious, and cruel to all who have crossed us—these diabolical propensities are checked and curbed by the authority and spirit of the Christian religion, and the application of it has converted men from low savages into refined and civilized beings.

*The punishment of sinners in eternal hell is excessive.* The future of the soul is a subject on which we have very dark views. In our present state the mind takes in no idea except what is conveyed to it through the bodily senses. All our conceptions of the spiritual world are derived from some analogy to material things, and this analogy must necessarily be very remote, because the nature of the subjects compared is so diverse that a close similarity can not be even supposed. No revelation has lifted the veil between time and eternity; but in shadowy figures we are warned that a very marked distinction will be made between the good and the bad in the next world. Speculative opinions concerning the punishment of the wicked, its nature and duration, vary with the temper and the imaginations of men. Doubtless we are many of us in error: but how can Mr. Ingersoll enlighten us? Acknowledging no standard of right and wrong in this world, he can have no theory of rewards and punishments in the next. The deeds done in the body, whether good or evil, are all morally alike in his eyes, and, if there be in heaven a congregation of the just, he sees no reason why the worst rogue should not be a member of it. It is supposed, however, that man has a soul as well as a body, and that both are subject to certain laws, which can not be violated without incurring the proper penalty—or consequence, if he likes that word better.

*If Christ was God, he knew that his followers would persecute and murder men for their opinions; yet he did not forbid it.* There is but one way to deal with this accusation, and that is to contradict it flatly. Nothing can be conceived more striking than the prohibition, not only of persecution, but of all the passions which lead or incite to

it. No follower of Christ indulges in malice even to his enemy without violating the plainest rule of his faith. He can not love God and hate his brother : if he says he can, St. John pronounces him a liar. The broadest benevolence, universal philanthropy, inexhaustible charity, are inculcated in every line of the New Testament. It is plain that Mr. Ingersoll never read a chapter of it ; otherwise he would not have ventured upon this palpable falsification of its doctrines. Who told him that the devilish spirit of persecution was authorized, or encouraged, or not forbidden, by the gospel ? The person, whoever it was, who imposed upon his trusting ignorance should be given up to the just reprobation of his fellow-citizens.

*Christians in modern times carry on wars of detraction and slander against one another.* The discussions of theological subjects by men who believe in the fundamental doctrines of Christ are singularly free from harshness and abuse. Of course I can not speak with absolute certainty, but I believe most confidently that there is not in all the religious polemics of this century as much slanderous invective as can be found in any ten lines of Mr. Ingersoll's writings. Of course I do not include political preachers among my models of charity and forbearance. They are a mendacious set, but Christianity is no more responsible for their misconduct than it is for the treachery of Judas Iscariot or the wrongs done to Paul by Alexander the coppersmith.

*But, says he, Christians have been guilty of wanton and wicked persecution.* It is true that some persons, professing Christianity, have violated the fundamental principles of their faith by inflicting violent injuries and bloody wrongs upon their fellow-men. But the perpetrators of these outrages were in fact not Christians ; they were either hypocrites from the beginning or else base apostates—infidels or something worse—hireling wolves, whose gospel was their maw. Not one of them ever pretended to find a warrant for his conduct in any precept of Christ or any doctrine of his Church. All the wrongs of this nature which history records have been the work of politicians, aided often by priests and ministers who were willing to deny their Lord and desert to the enemy, for the sake of their temporal interests. Take the cases most commonly cited and see if this be not a true account of them. The *auto-da-fé* of Spain and Portugal, the burnings at Smithfield, and the whipping of women in Massachusetts, were the outcome of a cruel, false, and anti-Christian policy. Coligny and his adherents were killed by an order of Charles IX, at the instance of the Guises, who headed a hostile faction, and merely for reasons of state. Louis XIV revoked the Edict of Nantes, and banished the Waldenses under pain of confiscation and death ; but this was done on the declared ground that the victims were not safe subjects. The brutal atrocities of Cromwell and the outrages of the Orange lodges against the Irish Catholics were not persecutions by



religious people, but movements as purely political as those of the Know-Nothings, Plug-Uglies, and Blood-Tubs of this country. If the gospel should be blamed for these acts in opposition to its principles, why not also charge it with the cruelties of Nero, or the present persecution of the Jesuits by the infidel republic of France?

*Christianity is opposed to freedom of thought.* The kingdom of Christ is based upon certain principles, to which it requires the assent of every one who would enter therein. If you are unwilling to own His authority and conform your moral conduct to His laws, you can not expect that He will admit you to the privileges of His government. But naturalization is not forced upon you if you prefer to be an alien. The gospel makes the strongest and tenderest appeal to the heart, reason, and conscience of man—entreats him to take thought for his own highest interest, and by all its moral influence provokes him to good works; but he is not constrained by any kind of duress to leave the service or relinquish the wages of sin. Is there anything that savors of tyranny in this? A man of ordinary judgment will say, no. But Mr. Ingersoll thinks it as oppressive as the refusal of Jehovah to reward the worship of demons.

*The gospel of Christ does not satisfy the hunger of the heart.* That depends upon what kind of a heart it is. If it hungers after righteousness, it will surely be filled. It is probable, also, that if it hungers for the filthy food of a godless philosophy it will get what its appetite demands. That was an expressive phrase which Carlyle used when he called modern infidelity "the gospel of dirt." Those who are greedy to swallow it will doubtless be supplied satisfactorily.

*Accounts of miracles are always false.* Are miracles impossible? No one will say so who opens his eyes to the miracles of creation with which we are surrounded on every hand. You can not even show that they are *a priori* improbable. God would be likely to reveal his will to the rational creatures who were required to obey it; he would authenticate in some way the right of prophets and apostles to speak in his name; supernatural power was the broad seal which he affixed to their commission. From this it follows that the improbability of a miracle is no greater than the original improbability of a revelation, and that is not improbable at all. Therefore, if the miracles of the New Testament are proved by sufficient evidence, we believe them as we believe any other established fact. They become deniable only when it is shown that the great miracle of making the world was never performed. Accordingly, Mr. Ingersoll abolishes creation first, and thus clears the way to his dogmatic conclusion that *all* miracles are "the children of mendacity."

*Christianity is pernicious in its moral effect, darkens the mind, narrows the soul, arrests the progress of human society, and hinders civilization.* Mr. Ingersoll, as a zealous apostle of "the gospel of

dirt," must be expected to throw a good deal of mud. But this is too much: it injures himself instead of defiling the object of his assault. When I answer that all we have of virtue, justice, intellectual liberty, moral elevation, refinement, benevolence, and true wisdom came to us from that source which he reviles as the fountain of evil, I am not merely putting one assertion against the other; for I have the advantage, which he has not, of speaking what every tolerably well-informed man knows to be true. Reflect what kind of a world this was when the disciples of Christ undertook to reform it, and compare it with the condition in which their teachings have put it. In its mighty metropolis, the center of its intellectual and political power, the best men were addicted to vices so debasing that I could not even allude to them without soiling the paper I write upon. All manner of unprincipled wickedness was practiced in the private life of the whole population without concealment or shame, and the magistrates were thoroughly and universally corrupt. Benevolence in any shape was altogether unknown. The helpless and the weak got neither justice nor mercy. There was no relief for the poor, no succor for the sick, no refuge for the unfortunate. In all pagandom there was not a hospital, asylum, almshouse, or organized charity of any sort. The indifference to human life was literally frightful. The order of a successful leader to assassinate his opponents was always obeyed by his followers with the utmost alacrity and pleasure. It was a special amusement of the populace to witness the shows at which men were compelled to kill one another, to be torn in pieces by wild beasts, or otherwise "butchered, to make a Roman holiday." In every province paganism enacted the same cold-blooded cruelties; oppression and robbery ruled supreme; murder went rampaging and red over all the earth. The Church came, and her light penetrated this moral darkness like a new sun. She covered the globe with institutions of mercy, and thousands upon thousands of her disciples devoted themselves exclusively to works of charity at the sacrifice of every earthly interest. Her earliest adherents were killed without remorse—beheaded, crucified, sawed asunder, thrown to the beasts, or, covered with pitch, piled up in great heaps and slowly burned to death. But her faith was made perfect through suffering, and the law of love rose in triumph from the ashes of her martyrs. This religion has come down to us through the ages, attended all the way by righteousness, justice, temperance, mercy, transparent truthfulness, exulting hope, and white-winged charity. Never was its influence for good more plainly perceptible than now. It has not converted, purified, and reformed all men, for its first principle is the freedom of the human will, and there are those who choose to reject it. But to the mass of mankind, directly and indirectly, it has brought uncounted benefits and blessings. Abolish it—take away the restraints which it



imposes on evil passions—silence the admonitions of its preachers—let all Christians cease their labors of charity—blot out from history the records of its heroic benevolence—repeal the laws it has enacted and the institutions it has built up—let its moral principles be abandoned and all its miracles of light be extinguished—what would we come to? I need not answer this question: the experiment has been partially tried. The French nation formally renounced Christianity, denied the existence of the Supreme Being, and so satisfied the hunger of the infidel heart for a time. What followed? Universal depravity, garments rolled in blood, fantastic crimes unimagined before, which startled the earth with their sublime atrocity. The American people have, and ought to have, no special desire to follow that terrible example of guilt and misery.

It is impossible to discuss this subject within the limits of a review. No doubt the effort to be short has made me obscure. If Mr. Ingersoll thinks himself wronged, or his doctrines misconstrued, let him not lay my fault at the door of the Church, or cast his censure on the clergy.

*"Adsum qui feci, in me convertite ferrum."*

J. S. BLACK.

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LEGISLATIVE OATH.—CONSTITUTIONAL CONVENTION,  
MARCH 10, 1873.

THE convention having resolved itself into the Committee of the Whole on the report of the Committee on Legislation, Mr. Black rose and spoke as follows:

MR. CHAIRMAN: This is a subject upon which I speak with great reluctance. But I am deeply anxious about it. I do most devoutly believe that the destiny of this Commonwealth, and perhaps that of the whole country, depends upon the decision to which this convention may come. I beg a brief hearing.

It will be admitted that the legislative function is by far the most important one in any free government. It is the supreme power of the State. All others are insignificant in comparison to it, inasmuch as all the others are bound to obey its will. The Executive is absolutely controlled by it in all the details of his administration. It marks out the path in which he shall walk, and it is able to punish him severely for any departure from it. The Legislature can not appoint the judges; but it can do more, it can command them what they shall do after they are appointed. All the legal justice we get is manufactured at the seat of government and sent down in bulk to the courts, where it is distributed among the people according to the wants and

merits of each individual. The Legislature regulates the practice of the courts, makes and unmakes the rules of evidence, and furnishes the standard of decision for every cause. It defines all public offenses, and supplies the remedy for every private wrong. All rights and all obligations are protected and enforced in the way that it prescribes, and can not be either protected or enforced at all without its aid and assistance.

The members of the Legislature are the custodians and trustees of all public property. They can sell it, or give it away, or they can increase it by making additional purchases. The taxing power enables them to descend as deep as they please into the pockets of the people of every class, and it has absolute control, and appropriates all the revenue after it is collected.

What is a still higher consideration, they are the guardians of public morality. It depends upon them whether virtue shall be promoted, or vice and crime be encouraged. The theory is that the Legislature, being the supreme power of the State, commands what is right and prohibits what is wrong, and, in a certain sense, the mere command or prohibition does of itself make it right or wrong. What we are taught in the Bible is certainly true, that they who frame iniquity into a law, compel the people to become workers of iniquity.

The time was, Mr. Chairman, when the State of Pennsylvania, then a mere colony, containing, perhaps, less than fifty thousand inhabitants, had a reputation throughout the earth for independence, justice, peace, and good order—for everything that goes to make up the happiness of an organized society. There was no portion of the world from which the eyes of the best and wisest men were not turned in admiration toward this community. All this resulted from the wise and just system of laws adopted by the illustrious founder of the colony. We lost our character as fast as we abandoned the principles upon which the early settlers conducted their legislation. As we can trace the grandeur, the honor, the high reputation of the State to the just laws of the earliest time, so we can read the history of her shame and her misfortunes in the statute-books of a later period. If we can now but unite the high tone of public morality which pervaded our legislation in the better days of the State with the wealth and science of the present generation, then you may hope to see this Commonwealth set higher than ever, the envy and the example of all the world. Without infusing into our new Constitution something which will have that effect, at least in degree, our institutions must, before a very long time, rot to pieces.

What we want above all things upon the earth, is *honest legislation*; and when I say we *want* it, I use the word in the double sense of needing it and lacking it.

After all that has been said upon this floor, it can not be denied



that the Legislature of the State of Pennsylvania has habitually and constantly, for the last twenty-five years or more, betrayed the trust reposed in its members; and this has gone so far that we must have reform if we would not see our institutions perish before our eyes. The horrible character and extent of the evil will be appreciated when you recall the solemn words of the gentleman from Dauphin (Mr. MacVeagh), the chairman of the Committee on Legislature. His position in this convention, to say nothing of his character and conscience, would make him extremely cautious not to be guilty, even of the slightest exaggeration, upon so grave and important a topic. He told us that corruption of the Legislature was a cancer at the heart of the State, which was eating its very life away. Another gentleman, the delegate from Erie (Mr. Walker), without intending to be at all condemnatory, but rather the reverse, declared that it was no use to swear the members of the Legislature, because they were, to his certain knowledge, so utterly degraded that they would take the oath and then immediately lay perjury upon their souls, without scruple and without hesitation. I believe him, for he certainly knows whereof he affirms. The evil fame of this thing has gone forth through the length and breadth of the country, insomuch that the gentleman from Indiana (Mr. Harry White), the chairman of the Committee on Legislation, vouches for this statement: That when one of his colleagues in the Senate was traveling in Connecticut, and it became known that he was a member of our Legislature, that fact alone raised a presumption against his honesty so violent that there was some hesitation about letting him go into an unoccupied room, lest the portable property to be found there might disappear when he went out! There was a time when membership of our State Legislature was a passport to honor and admiration everywhere, from a Parisian drawing-room to the cottage of a peasant. Now that same Legislature is a stench in the nostrils of the whole world.

There are about seventeen gentlemen on this floor who were formerly members of the Legislature. Of course they passed through the furnace of that temptation without the smell of fire upon their garments. While they have no sympathy with crime, they must naturally be anxious to make the best defense they can for the reputation of that body to which they once belonged. But, instead of a defense, all they can do is to hang their heads and acknowledge, with shame and sorrow, that the accusations are true.

The cry against this corruption comes up, not only from every part of this House, but from every quarter of the Commonwealth. It is borne to us on the wings of every wind. In his speech of this morning, the gentleman from Indiana (Mr. Harry White) acknowledged that the universal demand for a reform of these abuses had brought this convention together, and without that it never would have been called.

Nor is it a mere popular clamor. It is founded upon incontestable facts which have passed into the domain of history, and will stand there forever.

As long ago as 1836 the Bank of the United States pushed its charter through the Legislature, partly by direct bribery and partly by a base combination of private interests, which were openly and shamelessly avowed upon the face of the bill itself. The speculation exploded in the course of a short time ; but it scattered destruction everywhere, and brought desolation to a thousand firesides. It disgraced the character of the State ; destroyed her credit ; reduced her public securities to forty cents on the dollar ; branded her with repudiation, and made her name a hissing by-word among all the nations. The perpetrators of that atrocious outrage were never called to any account, and their impunity was an invitation to all others to go and do likewise. For years afterward, the other banks, combining themselves together, corrupted the Legislature and robbed the public according to the statutes in such case made and provided.

In process of time another class of corporations grew up, composed of more adventurous men with larger capital and with a more plausible claim to public favor.

I think that everybody who has looked at the history of our railroad system will admit that in its original organization it was intended for good and proper purposes. It promised necessary improvements which could not have been made in any other way. One of them, organized to make a road from Harrisburg to Pittsburg, undertook the duty under a charter every part of which is marked with cautious wisdom. If that company had been kept within the limits originally assigned to it, its career must have been entirely beneficent. But its organization gave it an influence upon the Legislature which it used unsparingly. It swallowed up nearly all the property that the State ever had. It took it substantially as a gift ; the five or six millions it paid was no consideration for the fifty or sixty millions it got. But that is not all ; the gift of this immense domain was followed by a surrender, upon the part of the Commonwealth, of her right to collect her own revenue, amounting to millions more, and which belonged to her as much as the purse in your pocket belongs to you.

Mr. CUYLER : My friend alludes to the repeal of the tonnage-tax.

Mr. BLACK : I do ; the learned gentleman understands me rightly. I refer to that fatal, that perfidious statute which the Legislature, the lobby, and the railroad company conspired to pass, disarming the State of her just right to collect the duty, which was her own, of three mills upon each ton of produce carried. It was a terrible wrong ; for it ground the face of labor to pour a great stream of wealth into the imperial treasury of a corporation which had no claim of right to it. By such dereliction of duty on the part of the Legislature, that cor-



poration has grown so mighty that its little finger is thicker than the loins of the Commonwealth which created it. I do not say that it bestrides your narrow State like a Colossus, for the ancient Colossus of Rhodes was but the image of a pigmy in comparison to this Colossus of railroads. Her stride is across the continent from ocean to ocean. Her head is in the clouds, and the arms of her gigantic power stretch out on either side from one horizon to the other.

I hope my very good and most amiable friend from the city (Mr. Cuyler) will take no exception to what I am saying. I would fain speak no evil, either of him or his clients. I know that he never tampered with the Legislature, and never advised anybody else to do so. On his brow such a shame as that would be a shame to sit. Nor am I complaining of the corporators themselves. I will take it for granted, if he asserts it, that there is not a man belonging to the Pennsylvania Railroad that would not run away from any proposition to make money for it or by it. He may say, if he pleases, that they have impoverished themselves by going about to do good for the public, or that, if they have a little more than their share of wealth, it has been thrust upon them against their will. But this I do say, that the several Legislatures which have stripped me and my fellow-citizens of our just rights, to clothe this corporation with imperial power, were treacherous to their duty and basely unfaithful to their high trusts.

Other corporations have powers similarly bestowed and nearly as great. Four of them have had the advantage of the loose legislation at Harrisburg, so as to secure monopolies a thousand fold more oppressive than that which made the name of Sir Giles Overreach infamous in the dramatic literature of England. What was the exclusive privilege of selling sweet wines in the reign of Elizabeth compared to the power which puts its own price upon every basketful of anthracite coal that is consumed in a country like this?

All of the companies represented in this body—nay, my friend on the left (Mr. Gowen) need not protest. I do not say that the Reading Railroad is represented here. He represents the same constituent body that I do; he is as faithful as I am; and we are both as true as steel. But I have some idea that my learned friend on the right (Mr. Cuyler) is or was once connected—most honorably, of course—with the Pennsylvania Railroad as counsel.

MR. CUYLER: Mr. Chairman, I beg leave to remind my learned friend that I have had his assistance in that capacity.

MR. BLACK: True; those gentlemen, or some of them, have been my clients, and I desire to speak respectfully of them for that reason, if for no other. They have been, and they probably will be again, when they have a perfectly good and just case, and want a thoroughly honest lawyer. [Laughter and applause.]

But, Mr. Chairman, the unfaithfulness of the Legislature is the sub-

ject with which we are dealing. Let us pass to another point in the arraignment. After the corporators were through with her—the State—she had left to her about nine million dollars—the remnant of a once magnificent fortune. That sum was deposited in what was called the sinking fund. It was placed there with special care. It was hedged around with constitutional interdicts. It was declared with the utmost solemnity in the fundamental law itself that it should be applied to no other purpose than the payment of the public debt. Yet a combination of private interests was organized to rob the State of this last residuum. A ring was formed; the Legislature and the lobby gave it their united sanction; they dived into the sinking fund and came up with the nine millions in their hands. The grab was nearly successful; it was defeated only by the interposition of the Governor's veto.

These are only a few of the instances in which the Legislature has proved treacherous. I have not mentioned one in a hundred. Nor have I selected the worst cases. Let any gentleman who wants fuller information look at the two papers made by Mr. Jordan, the late Secretary.

The whole system, according to his description of it, is saturated with corruption from the crown to the toe. It has gone so far that the veto-power is utterly incapable of stopping it. He declares that, if the Governor would try to stop it, combinations would be made against him, and render him as powerless as the driver of a runaway team after his reins are broken.

But there is one fact stated by him which will astound you when it is mentioned. He says that the office of Treasurer is the most lucrative in the State. Its profits must, therefore, exceed the enormous sums received by the officers of the State-House row in this city. This, he says, induces a regular scramble for the treasurership on the first week of every session; and then he adds that the votes which elect the Treasurer are notoriously bought by the successful candidate. The significance of that simple statement of the Secretary will hardly be understood without a little reflection. Remember that the Treasurer is paid by a fixed salary.

Mr. HOWARD: Five thousand dollars per annum.

Mr. BLACK: No man holding that office can, by any possibility, make out of it one cent beyond the five thousand dollars allowed him by law, without being guilty of some act as dishonest as the plainest stealing that ever was done by a common thief. Yet, somehow, the Treasurer of the State gets from his office enough to buy up a majority of the Legislature, and, after making all the deductions necessary for his reimbursement of that expense, there is enough left in his own pocket to enrich him beyond any other officer. These things, mind you, are not all done at once. The Treasurer does not take all of this sum at one grab; nor does he buy up the members by



wholesale. He has to make a separate bargain with each individual. If you could suppose one of these Treasurers to be convicted of every distinct offense that he has been guilty of in a year, and then suppose him to be sentenced according to law, upon each conviction, what would become of him? At the most moderate calculation you can make, it would take him at least fifteen hundred years to serve his time out in the penitentiary [laughter], and for a portion of that period he would be accompanied by a majority of the members of the Legislature. [More laughter.] These are the men that are intrusted with the collection and expenditure of all your revenue, with the control of all your public affairs, and with the power which gives or withholds security to your lives and property.

But, Mr. Chairman, I do not know that we ought to blame the members of the Legislature too severely. Something ought to be allowed for the temptations with which they are surrounded. They walk among snares, and pitfalls, and man-traps. In fact, they do not represent us. We are not governed by the men we send there. Our masters are the members of the lobby. They are organized into a third House, whose power is overshadowing and omnipotent. They propose the laws that suit themselves and the interested parties who send them there. The other Houses simply register their decrees. That our rights and liberties should be in such hands is disgusting in the extreme, for they are generally the most loathsome miscreants on the face of the earth.

My friend from Dauphin (Mr. MacVeagh) spoke of legislation under the figure of a stream, which, he said, ought always to flow with crystal water. It is true that the Legislature is the fountain from which the current of our social and political life must run, or we must bear no life; but, as it now is, we keep it merely as "a cistern for foul toads to knot and gender in." He has described the tree of liberty, as his poetic fancy sees it, in the good time coming, when weary men shall rest under its shade, and singing birds shall inhabit its branches and make most agreeable music. But what is the condition of that tree now? Weary men do, indeed, rest under it, but they rest in their unrest, and the longer they remain there the more weary they become. And the birds—it is not the wood-lark, nor the thrush, nor the nightingale, nor any of the musical tribe, that inhabit the branches of our tree. The foulest birds that wing the air have made it their roosting-place, and their obscene droppings cover all the plains about them: the kite, with his beak always sharpened for some cruel repast; the vulture, ever ready to swoop upon his prey; the buzzard, digesting his filthy meal, and watching for the moment when he can gorge himself again upon the prostrate carcass of the Commonwealth. And the raven is hoarse that sits there croaking despair to all who approach for any clean or honest purpose.

Mr. Chairman, this state of things can not go on without bringing us to utter destruction. It is getting worse and worse, and our institutions must utterly perish if we do not stop this mischief. We may preserve the forms of republican government, but the substance will pass away, and with it will depart all that is perfect in politics, all that is pure in morals, all that makes life, liberty, and property secure; all that makes existence in a free country worth having.

Shall we stand by and see this prodigious ruin rushing down upon us without an effort to arrest it? No, surely not. But, seeing that we are sent here for the very purpose of stopping it, we will perform our duty, and, with the help of the living God, we will succeed in our mission. We will deliver our good old Commonwealth from the body of this death.

But how shall that end be accomplished? I admit that it is possible to answer this question in different ways, when we come to the details of the remedy. But the common sense and common honesty of the people as represented here will make us unanimous at least on this—that the remedy shall be efficient, radical, thorough, and complete. We will not insult our constituents by offering them mere palliatives for the hideous malady with which they are afflicted. They know and we know that this is not a case for the quackery of half-hearted measures. We must cut the cancer out. A surgical operation on a vital part of the body, if it be not entirely successful, always hastens the death of the patient.

I am thoroughly persuaded that there is some fatal defect in our American system of legislation. It has failed ignominiously wherever it has been tried. It is not only here in Pennsylvania that we have rotten representatives and dishonest legislation. The same evil is found in the other States. It exists in its worst form and operates on its grandest scale in the Legislature of the Union. What is the cause?

The President of this Convention (Mr. Meredith) struck the point when, speaking of the misconduct of members of the Legislature, he said that it was because they were not responsible, and nobody was responsible for them. Washington said long ago that irresponsible power could never be safely trusted in human hands. By irresponsible power I mean power which may be abused without calling down any punishment upon the heads of those who commit the abuse. In this respect all our Constitutions are anomalous. They are a series of commands without any sanction to enforce them. This is particularly and emphatically true with regard to those who execute the supreme power of making your laws. You trust the members of your Legislature implicitly. The framers of the Federal Constitution, who were imitated in all the States, seem to have thought of legislative corruption as the Spartans did of parricide, that it was an impossible crime.



The Supreme Court of the United States, in *Fletcher vs. Peck*, influenced by this delusion because it was embodied in the Constitution, declared that they did not believe in the corruption of a State Legislature, though it was incontestably proved, admitted by the parties, and found to be true by a special verdict in the very case before them. Now, if anything is established by all human experience, it is that no rule of action, no law, no commandment will ever be observed by men who can promote their interests or gratify their passions by breaking it, unless they are deterred by the fear of retributive justice. If you desire men to do right, you must punish them for doing wrong. This may seem like a low view of human nature, but we can not help it; we are as we are made. Men are not equal to angels, and even the angels fell. In all cases every rule of conduct is coupled with a penalty for its violation—that is in all but ours, and it is true of ours in all except the fundamental and most important part of it. This is also the principle which runs through the divine law. Almighty God, who created the heart of man, understood the impulses which would govern it, and he annexed a sanction to every one of his commandments. There is no *brutum fulmen* in the Bible. The first law that ever was made for the regulation of human conduct is, in this respect, the model upon which every other has been framed: "On the day thou eatest thereof thou shalt surely die." And if Satan had not managed to convince our first parents that the penalty would not be inflicted, the fruit of the forbidden tree would never have been tasted.

Can there be any reasonable doubt that corruption reigns in the Legislatures of all the States and in Congress, for the reason that it can be practiced with perfect impunity? Can you or do you expect anything else from a body of men whom you surround with temptations of every kind to lure them into crime at the same time that you tell them they shall suffer nothing if they commit it? Such a system can not and it will not come to good. You might as well hope to gather grapes from thorns or figs from thistles.

In deciding upon the nature of the punishment which these great criminals ought to suffer, we must not consult our blood but our judgment. Our new laws must have no *ex post facto* operation, and the penalties, though certain, must be moderate even for future offenses. No sentiment of vengeance must seek its gratification here. If the honest citizens of the State who have been so basely betrayed by these miscreants would obey the impulse of their natural indignation, and had infinite power to work their will upon them, they would set them upon the remotest battlement of God's creation—far out upon the borders of chaos and old night—and then lash them naked around the circumference of the universe through all eternity. But human punishment can be inflicted only for the purpose of defending society;

all beyond that must be left in the hands of divine justice : "Vengeance is mine, saith the Lord ; I will repay."

We must look, therefore, to see by what means we can prevent these crimes, and confine ourselves solely to defensive measures. While we should avoid that kind of mercy to the guilty which is cruelty to the innocent, we must not lay a hostile finger on the most atrocious criminal, except in so far as that may be necessary to reform him or to deter others. To do even that would not be either wise or just, unless we accompany it by some regulation which will relieve them from the temptations to which they are now exposed. It would not be fair to surround members of the Legislature with snares set for their virtue, and then punish them when they lose it. Let us weaken the motives to evil at the same time that we strengthen those which impel toward right. So may the preponderance always be on the proper side of the scale.

I will now enumerate the measures in which we propose to embody these vital reforms. I hope the convention will believe, as I do, that if adopted they may save us from the greatest of all public calamities, and at the same time give no trouble or even inconvenience to any honest and upright man, whether in or out of the Legislature :

1. *Confine the power of the Legislature within limits as narrow as possible consistently with a proper regulation of our affairs.*—This can not be done to any great extent. A free people must have legislation, and the freer they are the more they need it, for there can be no liberty without law. The various opinions and diversified interests of such a people as are ours, multiply the laws that are necessary for their government. After limiting the power of the Legislature as much as you can, you must still leave it in possession of a great deal. Indeed, you can scarcely diminish it in any perceptible degree ; and what is left in its hands is liable to be as frightfully abused as if none was taken away.

2. *Prescribe certain forms of proceeding which will insure deliberation and publicity.*—I need not specify these forms. You find them in the report. They require a bill to be reported by a committee, and then read through and through, not once or twice, but three times in each House ; the final vote to be taken by yeas and nays, and recorded ; each bill to have but one object, and that expressed in its title ; every law to be preceded by a preamble expressing the reasons of the Legislature for assenting to it ; the final passage of the law to be concurred in by a majority of members elected to both Houses, and, after passage, the title of it to be publicly read immediately before it is signed by the Speaker. These forms will do much to prevent hasty and thoughtless legislation, and make it much more difficult than it is now for members to commit frauds upon one another by clandestinely procuring the passage of bills which a majority do



not consent to. But they will not throw any serious impediment in the way of injurious legislation to which a majority of the members can be induced to consent. The most iniquitous laws we are cursed with have been passed without resort to the tricks which these forms are intended to prevent. Corrupt combinations are made every day which carry a majority, with their eyes wide open, through all frauds, and, as Secretary Jordan tells us, strong enough to break down the Executive, armed though it be with the veto. While, therefore, these provisions are salutary and desirable, they are not sufficient of themselves to save us. I proceed to show what more seems to be necessary.

3. *Define bribery so as to include all sorts of corruption.*—When a member is to be corrupted, he is not in one case out of a hundred offered money in the plain form of a *quid pro quo*. Almost never is a contract made in words that the vote shall be sold for a certain price paid down as promised. The money is presented as a gracious gift or as a testimonial of the donor's affection—it is slipped into the pocket of the member without a word, or it is placed under his pillow, where he finds it. Most commonly the object is reached by a wider *circumbendibus*. The member is employed as attorney for the party interested in his vote, and the bribe comes in the shape of a fee for other services. It is not at all unusual for members who are considered respectable to let themselves be bought in this way. Still oftener the end is accomplished by giving the member an interest in the subject-matter whose value is to be affected by his vote. The stock of a corporation is distributed "where it will do most good," or the member is taken as a partner into some speculation which he is to promote by procuring legislation. In a thousand ingenious ways it may be made his private interest to disregard his public duty. All these ways are equally corrupt, and the people owe it to themselves to stop them.

4. *Extinguish the lobby at once and forever, by making all private solicitation of members by interested parties or their agents a criminal offense.*—This is so obviously proper and right that it can hardly be necessary to vindicate it. The hirelings of corruption have organized themselves into a "third house," they have usurped the power which the Constitution gives to the other two; they exercise the supreme legislative authority of the State; the Senate and House of Representatives are degraded into their mere tools, and I repeat that they are the most loathsome wretches that are suffered to live in the world. All men agree to this as a matter of fact. Nobody doubts the omnipotent power of the "third house," or the evil purposes for which it is used, nor has any one ever suggested the least possible good that can result from its continued existence. The total abolition of this "third house" is demanded not only to secure the weak from temptation, but as a measure of protection to the strong and upright from insult and annoyance. By adopting it you purify



the Legislature instantly and restore the honor of your government ; for there never has been any bribery, corruption, or other improper influence which did not come privately and secretly in that way. Let no man say that we desire to cut off communication between the representative and his constituents. All public means of expressing his opinions and wishes are to be left open ; the right of petition shall be as sacred as ever ; the privilege of being openly heard before committee shall be carefully secured ; the right of the people to assemble and speak their will, or to discuss their affairs through the press, shall not be denied. The representative ought to be controlled in some measure at least by an enlightened public opinion, but it is not necessary for that purpose that he should open his ear to the insulting whispers of the miscreants who now dog him up and down the board-walk, and follow him to his lodgings, and stand behind his chair when he votes.

5. *Make all fraudulent acts of the Legislature void.*—As the law is now held by all the courts, a legislative grant, whether of money, lands, or privileges, is sacred and inviolable, no matter how clearly you can prove that it was obtained by fraud, deception, or bribery. This doctrine was established seventy years ago by the Supreme Court of the United States in *Fletcher vs. Peck*. The case itself was a fraud ; it was made up at Boston by two men who lived in Tennessee, both of them having the same interest in the same fraudulent grant, and the counsel who pretended to argue it was employed and paid to give the cause away. This is not publicly known, but I assert it on the authority of Judge Catron, who knew the parties well, and was often told by both of them that the case was a sham, and the judgment collusive. The principle apparently decided by it is not found in the common law, and is directly in conflict with common sense and plain justice. It violates all the analogies of our jurisprudence. Not only private grants but judicial decrees and executive concessions are pronounced mere nullities when brought into contact with any kind of corruption. Yet the grossest fraud upon the public or upon individuals when committed by or through the Legislature is consecrated and protected. It has wrought intolerable mischief. It gives infinite encouragement to the worst form of public immorality. It shelters every villain of a certain class who can get away with his booty ; and stifles inquiry into the worst wrongs by making it practically useless. If legislative acts were void from corruption, what man or what corporation would think it worth while to pay bribes ? We can and ought to abolish this absurd and iniquitous principle. Let it be done, with such reservations as will prevent any loss to innocent people, but let us cease to pay a premium for legislative rascality.

6. *Swear or affirm every member before he takes his seat that he will not only support but obey and defend the Constitution in all*



*things.*—The oath to support it, required by the Federal Constitution, was intended as a mere test of political opinion, to exclude the enemies of the new government from office. To support does not mean to obey. You support the church when you rent a pew and pay the preacher, though you do not square your moral conduct by its precepts. But this preliminary oath being promissory in its nature, I do not think it just to make the subsequent violation of it punishable as perjury. Where it has been taken in good faith, with pure intent to keep it, a breach of the promise it expresses does not justify a charge of false swearing. That among other reasons makes it necessary that there should be another oath or affirmation upon which perjury can be assigned.

7. *Require every member at the close of his last session to render an account of his stewardship to his own constituents at home.*—Make him swear or affirm, specifically, that he *has* obeyed the Constitution, that he has not listened to private solicitation, or taken any bribe, or knowingly done any other act in his official capacity interdicted by the fundamental law. If his hands are clean, he will be willing to show them. If they are not, and he declines to show them, the public can have no further need of his services, and he should not be eligible to the same or to any other office. The necessity of taking this last oath will effectually cut him off from all intercourse with known lobbyists, and free him completely from improper influences, for unless he is a moral monster, he will not do a thing with the preconceived determination to swear that he has not done it. I do devoutly believe that this measure, connected with the others proposed, will make our legislation as pure as it was in the days of William Penn.

In conclusion, let me call the attention of gentlemen to the resemblance between these provisions and those which prevail in analogous cases of a private nature. A member of the Legislature is charged with the administration of the most important trusts known among men. If anybody should be held, and held hard, to his duty, it is he. Yet we only propose to enforce his obligations by the same means which we use against a private trustee. When an executor, administrator, or guardian takes his duty upon him, you swear him to obey the laws. When he goes out you compel him to render an account, on oath, in which he specifies the particular acts he has done, and, if he swears falsely, you indict him for perjury. And if he serves his own interests by making a contract in fraud of his *cestui que trust*, you hold his act to be void. Why should not the great trust of a legislator be subject to the same rules? Is it because you are willing the public trust shall be betrayed, but desire the private one to be honestly administered? This will hardly be the answer of those who oppose us. What it will be I know not.

## A GREAT LAWSUIT AND A FIELD FIGHT.

"Chapters of Erie, and other Essays." By Charles F. Adams, Jr., and Henry Adams. Boston: James R. Osgood & Co. 1871.

"An Inquiry into the Albany and Susquehanna Litigations of 1869, and Mr. David Dudley Field's Connection therewith." By George Ticknor Curtis. New York: D. Appleton & Co. 1871.

IN the years 1869 and 1870 there occurred a contest for the control of the Albany and Susquehanna Railroad which, in some of its features, is among the most remarkable that this generation has known. It concerned vast material interests, and, from peculiar circumstances, engaged an amount of public attention not often bestowed on such subjects. It produced a long series of litigations, angry, complicated, and multifarious. The judicial authorities were wholly unequal to the task of settling the dispute; for, instead of composing the strife, their intervention only intensified it, until at last the parties, mutually scared by the cross-fire of conflicting injunctions which the courts were launching at all alike, sought relief in the more peaceful arbitration of pike and gun. When this was stopped by the Executive, the newspapers took up the war, and going over the whole ground again, they not only canvassed the rights and wrongs of the parties, but assailed counsel and judges with most unlimited censure. The character of one gentleman in particular (Mr. David Dudley Field), noted hitherto and honored not less for high integrity than for profound learning, was traduced with a license which knew no bounds.

The two books whose titles stand at the head of this article are chiefly interesting because they contain the opposing views of two very able men upon the whole of this controversy; and the recent republication of both, with notes and other addenda, is a new appeal to the great tribunal of public opinion. Before final judgment we propose to say a few words more, but, being nobody's attorney, and representing no personal interest, we must be considered as speaking in the character of *amicus curiæ*.

Mr. Curtis's great advantage over Mr. Adams, and indeed over every one else who has discussed this subject, consists in the high tone of his essay and the spirit of perfect fairness which pervades it from beginning to end. Though a great master of rhetoric (as the biographer of Webster ought to be), no provocation tempts him to any display of it here; his style is eminently judicial; his statements are severely accurate, and for all his averments he quotes chapter and verse in a way which makes contradiction hopeless. His only apparent ambition is to build up a solid wall of argument; he constantly tests its perpendicular with the plummet, and strikes every stone with the edge of his trowel to make sure that it lies firm in its place.

Mr. Adams is an hereditary bondsman to the truth; by his blood



and birth he owes service to the right, and if he flies from it we have a warrant to reclaim him as a fugitive. We do not believe that he would lend the authority of his great historical name to a willful misstatement, or that he would even take up an evil report against his neighbor and help to propagate it for the mere purpose of gratifying anybody's malevolence. But his intense dislike of James Fisk, Jr., seems to have unbalanced his judgment upon every subject with which Fisk has the remotest connection. This is the one masterless passion which sways him in all the moods and tenses of his thought. Fisk is his *bête noire*. His enmity to Fisk is extended not merely to Jay Gould, Fisk's partner in business, but it embraces all Fisk's associates in the management of the Erie Railroad, and takes in every lawyer who has ever defended his rights and every judge who has ever allowed him to use the legal process of his court. The moral sense of Mr. Adams has been offended, perhaps very justly, by something he has seen in Fisk's conduct or character; and his indignation has become so preternaturally excited that he likes or loathes all other men as they happen to be for Fisk or against him in any of his contests, whether right or wrong. Inasmuch as Mr. Adams must necessarily be, and is without doubt, a man of sound moral principles, we give this as the only rational explanation we can furnish of his attack upon Mr. Field, and of what needs explanation quite as much, his idolatrous veneration of Ramsey and his pronounced admiration of Judge Darwin Smith's decision at Rochester.

It was not necessary for Mr. Curtis to tell us that he had no personal knowledge of or association with Mr. James Fisk, Jr., or his partner Jay Gould. Nobody would have suspected that grave and learned gentleman of any close companionship with a man so *outré*, irregular, and eccentric in his tastes and habits as Mr. Fisk. If ignorance of Fisk and all that Fisk inherits be a virtue, then we can claim to be as virtuous as anybody. But we make no pretensions whatever to that outrageous and extravagant righteousness which prompts Mr. Adams not only to denounce Fisk himself, but to assail every man that does him justice and heap laudations without measure on all who try to swindle him or his associates.

Most of our readers will altogether fail to understand the merits of the controversy or the incidents which attended it unless they make themselves acquainted, at least to some little extent, with the singularities of New York jurisprudence, produced partly by what is called a reform in the Code of Procedure, and partly by a most anomalous and extraordinary organization of the judicial system. A moment's attention to this will explain our meaning, and show that the confusion, misapprehension, and total failure of justice which took place in these cases, while they could not possibly have happened in any other country, could scarcely have been avoided in New York.

It was in 1830 that Lord Brougham—that many-sided man, who spoke and wrote continually on every conceivable subject in literature, science, and art, but who knew less and cared less about the science of his own profession than about anything else—of whom Sugden said that it was “a pity the honorable gentleman did not know a little law, for he would then know a little of everything”—extended his notoriety by an elaborate and plausible speech on law reform. It was easy to point out defects in any system, and that of England, though expansive in its nature, had not grown with the growth of the nation. Some of its excrescences needed to be rubbed off; some of its forms were effete; a part of its process was costly and useless; its machinery was clogged with the quantity of business which the increased commerce of the country had thrown upon it. Brougham’s eloquence had the effect to stir up the leading minds of Parliament and call their attention to the necessity of some changes. But they went about it cautiously. They cheapened the law to the suitor by establishing new tribunals, they swept away impediments that stood in the path of justice, and they abolished many offices which merely encumbered the courts. But with reverent care they preserved the exquisite logic which for ages has been crystallizing into the forms of pleading. Instead of throwing it loose and lawless to the mercy of ignorant pretenders, it was made more exacting and precise than before: the declaration must give perfectly accurate notice of the demand; a plea must disclose the very defense to be proved; the general issue in most cases was abolished, and special pleading was made more special than ever. Nor did they for a moment think of dispensing with those rules of evidence which the experience of mankind had shown to be necessary to the successful investigation of truth.

But Brougham’s speeches, together with the maledictions of Bentham, created a far profounder sensation in America than in England. Here they produced among many influential men a passionate appetite for radical revolution. Everything that was old or English began to be looked on with contempt; whatever had been held in reverence by our fathers, on this or on the other side of the water, was set down as worthless; even the writ of *habeas corpus* and *trial by jury* were strongly suspected of being obsolete humbugs, and the public mind was preparing itself to see them trampled under foot without an effort to save them. Good and great men, as well as the weak and the wicked, were subjected (of course for opposite reasons) to these malign influences, and both classes were in equal haste to bury the old system out of sight.

In New York, where this feeling was strongest, the revolutionary party did itself honor by accepting the leadership of the ablest and most distinguished jurists of the State. A full Code, as comprehensive as that of Napoleon and as minute in its details as that of Living-



ston, was the work of their hands. They laid it at the feet of the Legislature, and that body adopted the Code of Procedure, but rejected all else that was proposed. They put into operation just enough of it to abolish the distinction between law and equity, without preventing the possible abuses of either; to confound all remedies by mixing them together and making one form of action serve against every species of wrong; and to banish every trace of science from pleading. What might have been the success of this empirical raid on the common law if the whole Code had been adopted, it is impossible to say; but the experiment as actually made is not merely a failure—it is a disastrous visitation upon the people of the State. Instead of the cheapness, certainty, and promptness which the reformers no doubt intended to promote, the unlucky suitor is vexed with endless delay, impoverished by enormous costs, and at every turn is liable to be tricked and deluded to his ruin. The new Code encourages ignorance, rapacity, and fraud, by inviting everybody to practice it who can not live at any other trade, and gives a large share in the administration of justice to a class of men for whom the English language had no name until a new epithet of contempt was added to the vocabulary.

The separate administration of law and equity used to be a standing subject of invective with the reformers. A court of law could not refuse judgment in favor of a plaintiff who claimed a legal right; but if the defendant had an answer founded on a paramount equity, a chancellor might enjoin his adversary not to take advantage of his mere legal superiority. It was thought extremely absurd that the authority of two tribunals should be invoked to do justice in the same case between the same parties, and that what was called right in one court should be pronounced wrong in another. We do not stop now to defend, as we might, the wisdom of circumscribing the power of judges and assigning different functions to different classes of them. But under the Code, the wall of partition between law and equity is completely broken down; the law judges are all chancellors, and, *vice versa*, all chancellors are law judges, and they administer both equity and law in forms so exactly alike that the judges themselves do not know, and are not bound to know, which is which. There is, therefore, no possible excuse for employing more than one tribunal in the same cause. Nevertheless, the frequent and allowed practice is for the defendant, instead of answering a complaint, to file a counter-complaint against his adversary. An injunction is the favorite weapon in all contests. Its simplicity commends it to the professional mind, as the simplicity of the knout and the bastinado makes them dear to the heart of the Muscovite and the Turk. It can always be got for the asking, if the request be accompanied with an affidavit that somebody wants it "to the best of his information and belief." It is granted of course, *ex debito justitiæ*, without examination and

without notice to the opposite party ; it is granted privately ; it is not put on record ; it is not placed in the hands of a public officer to be served or executed, but the judge gives it to the complainant himself or his attorney, who keeps it a secret if he pleases until he catches his victim at a disadvantage, and then springs it upon him from his pocket. Unfortunately, however, this is a game that two or a dozen can play at as well as one. The party enjoined by one judge can go to another judge equally facile, and get an injunction against his adversary, commanding that the order of the first shall be disobeyed. Or a third person may seek a third judge, who will readily throw his force against either or both. There are thirty-three judges in the State, of equal grade and co-ordinate power, elected in eight districts, and residing in different regions, to whose jurisdiction there are no territorial limits except the lines of the State. Each one of these claims the right, and exercises it, of enjoining whom he pleases, without regard to the cognizance which may have been previously taken of the subject or the parties by one or more of his brethren ; and his process, orders, or decrees, are equally potential in every part of the State. A man enjoined by a judge in New York city to do a thing may be ordered by a Buffalo judge *not to do it* ; and a Brooklyn judge who has commanded one of his constituents to refrain from a particular act, may be met the next day by a counter-order from Rochester in which the same party is solemnly directed to *refrain from refraining*. These injunctions are not mere *brutum fulmen* ; the judicial guns on either side are loaded to the muzzle with the heaviest metal they can ram down. Each judge demands implicit obedience to his own order, and the penalty of disobedience can not be escaped by showing that the parties are under conflicting orders from another quarter ; for the learned magistrates who administer the Code act on the principle of that ultra-democracy which insists that one man is not only as good as another, but a great deal better. It happens thus that, in a case involving numerous and complicated interests of great value, all persons concerned get hemmed in with injunctions from various parts of the State, commanding them by authority, which they dare not question, to do everything, and at the same time to do nothing. They can neither move nor stand still without incurring a penalty somewhat like that of outlawry in feudal times. Their cause may be pending in a score of courts at once ; a party who prosecutes or defends in any one of them is guilty of contempt, and, if he fails, a decree is pronounced against him by default. His condition is like that ascribed by Lorenzo Dow to a predestined reprobate under the creed of Calvin :

You shall and you sha'n't—you will and you won't ;  
You're condemned if you do, and you're cursed if you don't.



\* When all the parties are bound hand and foot, so that justice or even an investigation in the courts has become a thing of impossible attainment, the case is considered about ready for trial in the newspapers, where the suitors, the counsel, and the judges are plastered with praise, or covered with odious imputations, according to the various interests and tastes of those who engage in the discussion. We venture, though with some diffidence, to pronounce this rather a poor substitute for the trial by battle which would have been accorded in the middle ages. So thought the parties in the Susquehanna and Albany suits; for they actually loosened the deadlock of the courts by physical force. It is true that the champions did not go out on the open plain, and, after taking an oath against witchcraft, beat each other with sand-bags to show whose cause was holiest in the sight of God; but they did try whose judges had made the most righteous injunctions by rushing against one another with colliding locomotives.

It is due to the framers and original supporters of the Code to say that they never contemplated the frightful perversions which it has been made to undergo, nor are they at all responsible for the absurd arrangement of the judicial department which causes these scandalous conflicts of jurisdiction.

We devoutly believe that a fair consideration of the Albany and Susquehanna litigations will throw the blame of them on shoulders which have heretofore not borne their proper share. We will briefly present the most important of the facts pertaining to this *cause célèbre*, and leave the public to judge whether the attacks on the long-established fame of Mr. Field and his partners have any foundation in truth. The same public may determine if it can, "by what conjuration and most mighty magic" the Ramsey party have managed to invest their leader with the reputation of a persecuted saint. If we happen to have any readers who feel an interest in the most important of all worldly concerns—the distribution of justice among the people of a great State—some of them may be led to inquire if the system of judicial procedure which produces such intolerable evils can not be amended, or, if change be impossible, what amount of passive fortitude is required to bear it as it is:

". . . how end this dire calamity;  
What re-enforcement may be gained from hope;  
If not, what resolution from despair."

The Albany and Susquehanna Railway Company was incorporated in 1852, and began work in 1853, but the line was not opened for traffic until January, 1869. It stretches a distance of one hundred and forty miles from Binghamton, where it connects with the Erie, to Albany, whence its freights may be carried by direct routes to divers parts of New England. The Erie had previously sent its branches

into the anthracite deposits of Pennsylvania, and needed the use of the Albany and Susquehanna as a means of getting the coal it brought to Binghamton as far as Albany on its way to the New England market; and it was, of course, the interest of the new road to take all the business it could get in that way. Its track had been laid on the exceptional broad gauge of the Erie, which shows that its projectors had from the beginning contemplated that it would support and be supported by that line. It would, undoubtedly, have been improper for the great company to take control of the smaller one, or to appropriate its earnings; but their geographical relations, the similarity of their structure, their duty to the public, and the mutual interests of their proprietors, all required a cordial co-operation in business. Nevertheless, there was no special arrangement to that end, and no proposition to make one, until the stockholders of the Albany and Susquehanna solicited the aid of the Erie to rid them of the dangerous dishonesty which had crept into the management of their own internal affairs.

It was the great misfortune of the Albany and Susquehanna corporation to have trusted one Joseph H. Ramsey as its president and financial manager. He did not prove himself faithful. The bargains by which he raised money at usurious rates were not only disapproved by his constituents: they were indefensible on the score of common prudence. When his own interests were in conflict with the duties of his trust, he showed a lack of qualities even more important than sound judgment. He paid himself on one occasion \$16,000 for services which he alleged he had rendered the company as its attorney. He made the bill and settled it, absolutely refusing to let the finance committee pass upon it. He made a contract on behalf of his corporation with an express company, in which he ruinously sacrificed the interests of the party he professed to represent; it turned out afterward that he was a partner in the express company. Mr. Adams has proudly claimed for him, as a great merit, that he went to the Legislature "in behalf of the enterprise." Of such are the Albany rings. He ran for Congress once, and while he was a candidate he issued three thousand free passes over the road to as many electors, whose favor he sought to win at the expense of the company. At the time of his suspension from office he owed the company \$20,000, which he had taken from its funds for his own purposes, on his own terms, and by his own leave. Whether he subsequently disgorged this money does not appear.

It was manifest to the stockholders that these practices could not be continued without ruin to their prosperity and infamy to the character of their corporation; and they determined to stop them. But, like many other reformers, they committed the fatal mistake of adopting half-way measures. Instead of turning Ramsey out neck and



heels, they re-elected him, but by a very decided vote chose a majority of directors strong enough, as they thought, and true enough, to control his action and compel him to be honest. Seeing their forbearance, and probably mistaking it for timidity, he was hardy enough to tell them to their faces that he would permit no such oversight of his conduct as they proposed; that he would not belong to a divided direction; that at the next election either he or his opponents must go out. The stockholders accepted the issue thus tendered to them, and to maintain that issue was the object of all their subsequent struggles. Thus the corporators were hopelessly divided into two hostile factions. One of them, known through the legal proceedings as the Church party, and holding a large majority of the stock, was bent on having officers whose fidelity they could trust; and the other, led by Ramsey, wished to subordinate all the interests of the company severely and constantly to his own.

The next election was to take place in September, 1869, and the parties began without delay to look around them for the material of the contest. The authorized capital of the company was \$4,000,000, divided into 40,000 shares of \$100 each. Of these 40,000 shares 17,238 were outstanding in the hands of *bona fide* holders, who had paid full price for them, and whose right to vote them could not be disputed. The Church party were thoroughly satisfied that they and others opposed to the existing management held a clear majority of the legal and honest shares. On the other hand, Ramsey was not without expedients by which he hoped to win. About 2,400 shares had been forfeited by the failure of the original subscribers to pay for them. These were reissued by Ramsey to one David Groesbeck for twenty-five cents on the dollar, in direct violation of a general law which forbade any railroad company to sell its stock for less than par. Groesbeck was not only unscrupulous enough to become a party to this fraudulent over-issue, by which the honest stock would be watered, but he was entirely willing to vote it as Ramsey, his partner in the fraud, might desire. When the latter gentleman discovered that he could not balance the real stockholders in that way, he resorted to another trick, which was, if possible, baser as well as bolder. He got together certain of his confederates secretly at his own house, and distributed among them certificates for 9,500 shares of stock, for which they had not paid, and did not mean to pay, a single cent. It was necessary that something should appear to have been paid, but the recipients of the shares could not or would not furnish any money for that purpose. Ramsey himself had no cash of his own to advance, but he went to the company's safe, of which he had the key, took out bonds, the property of the company, amounting to \$150,000, pawned them to the same Groesbeck who had taken his former over-issue, and thus raised enough to pay ten per cent on the 9,500 shares. It is not easy to conceive a

transaction more thoroughly iniquitous than this. It was a double fraud : it was intended to stuff the ballot-box with bogus votes, and make the stockholders pay the expenses of the cheat upon themselves out of their own funds. That it might want no aggravating circumstance, it was planned and executed by a trustee whose solemn duty it was in law and conscience to protect and defend the rights of the injured parties against the knavery of others—not make them the victims of his own.

In the mean time the Church party, not knowing of these things, and unable to foresee what Ramsey might do, thought it prudent to re-enforce themselves by getting as many of the *bona fide* shares into their hands as possible, and thus make their majority large enough to balance any fraud which he could carry out. A considerable amount of the stock was held by towns along the line of the road, and it could not be got for less than par. In these circumstances they applied to the Erie managers for assistance in money to buy the shares which might be needed. The request was acceded to. There was no lawless intrusion of Erie, or of Fisk and Gould, into the affairs of the Albany and Susquehanna ; no volunteering in the dispute between Ramsey and his constituents ; no compact for any undue share in the control of the road. The men of the Church party desired to save their corporation alive out of the hands of Ramsey, and the Erie managers knew that by assisting them they would promote the true interests of every honest stockholder in both companies. Where motives so fair and wise and obvious exist for one party to make, and the other to accept, a business proposition, it is not necessary, but it is shameful, to allege corruptions which there is nothing to prove or even to suggest.

When the assistance of the Erie men was assured to them, David Wilber and others of the Church party proceeded by the authority of Mr. Gould, and with money furnished by him, to buy Albany and Susquehanna stock wherever they could get it ; and they secured a considerable number of shares, mainly from the towns, paying full price for them. By the 3d of August the Church party, and the friends of the company who acted with them, had 11,400 shares of the undisputed stock, leaving only 6,139 in other hands. Assuming that Ramsey might get all these, he must be beaten nearly two to one. Even if his friend and fellow-sinner Groesbeck should vote the 2,400 fraudulent shares held by him, the Church men would still have a majority of 2,864. Judge Barnard, at the instance of Mr. Bush, a member of the Church party, put Groesbeck *hors de combat* by an injunction which commanded him to deliver up his stock into the hands of Mr. W. J. A. Fuller, who was appointed to hold it as receiver, so that Groesbeck could not vote it unless he would come forward and show that he had a title, which of course he did not attempt to do,



knowing very well that he could not. The 9,500 false shares mentioned above had not yet been fabricated, nor had the corporation safe been robbed to pay for them at the time we now speak of.

Ramsey did not confine his operations to mere aggressive frauds upon his constituents; he was a master of defense as well as offense. "Fitz-James's blade was sword and shield." When he saw the heavy purchases his opponents were making, he instantly directed the treasurer to make no more transfers upon the books of the company to the Church party. Accordingly Phelps, the treasurer, refused to make official note of the transfer from the town of Oneonta, although there was no appearance of illegality about the sale, and the commissioners were personally present to affirm its perfect regularity.

To strengthen himself in his false position, he got an Albany judge to make an injunction forbidding the transfer. This was and could be nothing but a mere sham. It was in effect, though not in form, a suit by himself against himself, to restrain himself from performing a duty which he had predetermined not to do anyhow. The Church party not only got his Albany injunction dissolved, but fulminated another upon him from New York, which commanded him to refrain from his refusal to make the transfer.

But Ramsey defeated the object of this last injunction by an outrage which has no parallel even in the history of his own iniquities. He furtively took the books of the company, carried them away, and hid them part of the time in a tomb in the Albany graveyard, and part of the time in other lonely places where they were beyond the reach of judicial process, out of the stockholders' sight or knowledge, and accessible only to himself and a few of his trusted accomplices. By this *conveyance*, as Pistol would call it, of the record, he not only prevented all transfers to *bona fide* purchasers, but put it into his power to fabricate, without detection, as much bogus stock as he might need for his own purposes. In point of fact, it was on the same night signalized by the disappearance of the books that he manufactured the 9,500 shares which he pretended to pay for with the proceeds of the company's bonds.

It was very plain by this time that the stockholders needed the help of judicial authority to save their rights from the most atrocious violation; and it will be seen hereafter that judicial authority, as administered in New York, was very far from being effective to that end. However, the war of injunctions had already commenced. The next gun was a heavy one. It was an order obtained *ex parte* from Judge Barnard in New York city, suspending Ramsey from office, and restraining the issue of any more stock unless under a resolution of the directors, after public notice, and upon payment of its par value. This order was made at the instance of David Wilber, a stockholder, a director, and an active supporter of the Church party. The complaint

charged Ramsey (and no doubt charged him truly) with divers misdemeanors, which showed that he was wholly unfit for his trust, or indeed for any other. The proceeding was justifiable in this particular case, not only because the law allowed it and the court awarded it, but because the special end it aimed at was right and proper.

But it is not easy to defend on general principles the wisdom of the law which permits even a guilty man to be scourged before he is condemned. It is true that Ramsey was offered a chance of being heard in his own defense *after* he was deposed; but this reverses the inflexible rule of the common law, which in all cases and under all circumstances requires the hearing to *precede* the punishment. Indeed, the New York Code has in this respect but one example to keep it in countenance, and that is found in the hard ruling (according to Virgil's report) of the judge who presided in what may literally be called "the court below":

Gnosius hic Rhadamanthus habet durissima regna,  
Castigatque, auditque dolos, subigitque fateri.

Sir Edward Coke, quoting these lines, says: "The philosophic poet doth notably describe the damnable and damned proceedings of the Judge of Hell. First he punisheth, and then he heareth, and lastly he compelleth to confess. But good judges and justices abhor these courses."

Ramsey and his advisers not only learned the lesson their opponents taught them, but they bettered the instructions. They were quick enough to see that, under a law which struck without hearing, a false accusation was just as good as a true one. Ramsey, therefore, did not close his eyes to sleep before he trumped up a series of charges against Mr. Herrick, the vice-president, and four of the directors, that they were in a conspiracy with the managers of Erie for a surrender of their line to that corporation, which was corruptly managed by Gould, Fisk, and others, for their private ends. On this complaint a Judge of the Supreme Court at Albany promptly, and without the least hesitation or demur, granted an injunction to restrain the vice-president and directors from exercising their functions. This swept the board clean, and left the Albany and Susquehanna Railway Company with millions of dollars' worth of property in a most critical situation, and without a soul who could legally take charge of it.

The judges of New York were as rapid in their movements as the old courts of *Pie Poudre*. Ramsey got his injunction to stop transfers on the 2d of August. On the 3d he was enjoined to make the transfers. On the 4th Wilber's injunction deposed him; he was notified of it on the morning of the 5th, and on that same day he made his counter-complaint; in the course of the night he carried off the books



and fabricated the false stock; on the next morning he served his order upon the vice-president, and the corporation was broken to fragments.

Thus far Ramsey was the winner. With the records of the corporation in his exclusive possession, a treasurer at his elbow to whom his word was law, and numerous active confederates to do his bidding, he was master of the situation. To be sure, his enemies had deposed him, but he had also deposed *them*, and put their property in peril of extreme and ruinous loss—"which, if not victory, was at least revenge."

Things had come to a crisis in the affairs of the company where the stockholders could do but one thing, and that was to have receivers appointed who would keep the road running until its regular management could somehow be restored. The Church party, who owned by far the larger part of the stock, and who had paid not only fair but high prices for it, could not look upon their condition with calm indifference. They were constrained to act promptly. Accordingly, on the evening of the 6th of August, they applied to Judge Barnard, and got him to appoint two receivers, Charles Courter and James Fisk, Jr. The appointment of Mr. Fisk provoked a torrent of vituperation. It has been considered a sufficient reason for charging the judge, the counsel, and all others concerned in it, with gross corruption. Without stopping to inquire whether Mr. Fisk was or was not as proper a person as any other for such a trust, we note two facts which should stop this outburst of calumnious accusation. In the first place, the authority given the receivers was joint, and Fisk could do no act, good, bad, or indifferent, without the approbation of his colleague, who was and is a gentleman not only of very large estate, but of most unblemished character; and, secondly, the appointment was made with the consent, expressed in writing, of seven directors representing an undoubted majority of the stockholders. The order was privately signed by the judge, after the manner of New York judges; but if this was law and custom in all cases, as it undoubtedly was, why should there be an outcry about the observance of it on this occasion? It becomes especially absurd when we find that another judge, acting in Ramsey's interest and at his request, was doing the very same thing at Albany on the same night and at about the same hour!

Yes, Ramsey had countermined the Church party again. Before Messrs. Courter and Fisk could reach Albany with Judge Barnard's warrant to take possession of the trust, Judge Peckham had privately, in the office of his son, invested a Mr. Pruyn with the same powers, and Mr. Pruyn had possession of the company's office and the road at that end of it. Messrs. Courter and Fisk, by their agents, got hold of the Binghamton end, and that was all they could do. This brought the parties to close quarters. The conflict between opposing receivers, holding their authority from courts of equal jurisdiction, and acting

under irreconcilable orders which each party claimed to be of superior obligation, presented in a practical shape the ancient problem of an immovable body encountered by an irresistible force. Judge Peckham's receiver determined to hold fast, and the magistrate who made him did not suffer him to languish for lack of helpful process and reinforcing decrees. Judge Barnard, not to be behind his brother Peckham in pluck and energy, provided *his* receivers with writs of assistance and all the other weapons they asked for out of his judicial arsenal. Everybody was in contempt, and everybody was in default. The sheriff, whose duty it was to execute the conflicting orders, was utterly bewildered. He was required to call out the *posse comitatus* to support each party against the other. He could not perform the functions of his office unless he would "divide himself and go to buffets with the pieces." A great battle was impending, and as the sheriff with his *power of the county* was to be on both sides, the result could not possibly be foretold. Hostile bodies of workmen were drawn out, armed with pistols and bludgeons, and locomotives got up steam and ran into one another. The scene would be an odd one in any civilized country outside of the State where it occurred; for all parties were fighting under the ensign of public authority. It was judicial power subverting order and breaking the peace; it was law on a rampage; it was justice bedeviled; in one word, it was the New York Code in full operation.

The Governor, it seems, had been watching the current of this heady fight; he thought it might be his duty to interpose the militia between the combatants, and conquer a peace by making a war upon both of them. The opposing receivers, to "stop the effusion of blood," were persuaded to unite in a petition to the Governor to take possession of the road and operate it by a superintendent of his own choosing. The Governor thereupon appointed Colonel Banks, stipulating that his custody should end as soon as the rights of the contesting parties could be ascertained and settled. This peaceable adjustment was effected by the exertions of Mr. D. Dudley Field, who, though his partners had previously been concerned for the Church party, now first appeared as an active participant in the controversy. His wisdom, good temper, and sound sense discerned what was not seen by others—the incapacity of the judicial department to manage such a business, and the necessity of putting it under executive arbitration.

The property of the company being now safe from destruction, the stockholders had nothing to do but watch and pray that Ramsey might not by any stratagem defeat their right to choose an honest board of directors. The election-day came round in the fullness of time; the majority proceeded to business and cast their votes; but Ramsey pronounced their organization illegal, retired with his confederates to an adjoining room, opened a pool, and declared himself and others in his



interest duly elected. He did not vote the 3,000 shares sold to Groesbeck, nor the 9,500 fabricated on the night of the 5th of August; but he and his friends held some undisputed shares which they did vote at their own poll, and by ignoring the majority he was able to count himself in without difficulty. Both boards claimed to be duly elected, and they organized by choosing Messrs. Church and Ramsey their respective presidents. Both demanded the surrender of the corporate franchises into their hands, but the Governor did not think himself authorized to decide between them.

Two or three circumstances connected with the election, though unimportant in themselves, require to be noticed here, because they have been much commented on elsewhere.

The fraudulent asportation of the records was accomplished on the 5th of August. The election was on the 7th of September. On the night of the 6th, Phelps and a son of Ramsey secretly carried the books to the rear of the building and hoisted them up to the window of the treasurer's room in a basket, with a rope tied to its handle. Nobody but Ramsey and his little band of confederates knew of this midnight restitution of the books until they were produced at the stockholders' meeting next day. In the mean time the Church party, seeing the election approach and feeling the necessity of having the ledgers and stock-lists for inspection, and having failed in various efforts to get even a sight of them, resolved upon taking a legal remedy. They brought suit in the Supreme Court for the city of New York against Ramsey, Phelps, Pruyn, and Smith, charging them with carrying away the books and concealing them from the stockholders. By the Code the defendants in such a case are liable to personal arrest, and bail was accordingly demanded in \$25,000. The process was issued on the 6th of September, and the parties were arrested (and bail taken immediately) on the morning of the 7th (the election-day), the sheriff having chosen his own time to execute the process. We have entirely failed to comprehend what the meaning of the men can be who vilify Messrs. Field and Shearman and their clients for bringing this suit. Of all the measures taken by either of the parties against the other, throughout the contest, this seems to us the most unquestionably just and proper. It is mere nonsense to call it harsh or oppressive. It was meant to redress a most atrocious wrong, for which the perpetrators, by the law of any other Christian country, would have been condemned as criminals to heavy fines and long imprisonment, without bail or mainprise. Even the legislation of New York does not overlook the necessity of punishing an outrage like this, just as it might have been punished in a civil action before reform was thought of. It is some honor to the Code that, for once, it spoke out in the well-measured and majestic tones of the common law.

The presence of what has been called "a congregation of roughs"

in the room was subsequently talked of very freely. It is doubtless true that on both sides of the apartment there crowded a considerable number of men not clothed in purple and fine linen, nor having much the appearance of heavy capitalists. It happened thus: The inspectors under whose auspices Ramsey designed to hold the election were disqualified for their office by reason of not being stockholders. To restrain them from acting, the Church party, of course, betook themselves to the everlasting injunction, and on the morning of the election got out one of those convenient engines to neutralize the illegal authority which Ramsey wished to bestow and probably to abuse. This would leave the inspectors to be chosen *viva voce*, and the impressiveness of assent or dissent might depend on the number of throats and strength of lungs employed in expressing it. Probably both parties anticipated this or something like it. It is certain that both improvised a force of courageous and muscular gentlemen, and, by putting a proxy in the hands of each one, they gave them all a technical right to be present and to swell the volume of the *ayes* and *noes* with their "most sweet voices." But there was no actual disorder, no intimidation, no violence or threat of violence.

Another thing: Groesbeck had been enjoined, and his 2,400 fraudulent shares had been put into the hands of a receiver to be held, so that Groesbeck could not vote them. The Ramsey men, on the morning of the election, undertook to trump this injunction by getting from Judge Clute, of the Albany County Court, another injunction which forbade the inspectors to receive *any votes of the Church party* unless the *holders* of the fraudulent stock should first vote on that. Fuller, the receiver, happened to be present. No doubt he was puzzled. He *held* the stock, and, by legal intendment, Judge Clute's order applied to him if it applied to anybody. He could not give it back to Groesbeck without defeating the purpose for which he held it and exposing himself to the danger of being laid by the heels. If he refused to vote it, or let it be voted, a large majority of *bona fide* stockholders, with rights to vote otherwise undisputed, would be totally disfranchised. He took the advice of counsel and untied the knot by literally obeying the Clute injunction and voting himself. Ramsey and his men were fairly infuriated by the failure of their shallow and impudent trick. He and his counsel and his judge had made the blunder of supposing that Groesbeck was in law the holder, and they got an injunction which they fancied would reinstate his fraudulent possession or else defeat the clear right of all their opponents. But they got one which, in fact and in law, defeated themselves. Mr. Ramsey is not the first engineer that was hoist by his own petard.

The Governor naturally desired to get rid of the perplexing and anomalous trust imposed upon him by the agreement of the parties. Perceiving that the election was an abortion, and seeing that the judi-



ciary had completely failed to settle anything in any of the numerous suits pending between the parties, he directed the Attorney-General to commence another in the name of the people *against both parties together*. This was not a *quo warranto*, nor a *mandamus*, nor a *bill in equity*, nor an action in *case* or *trespass*; these terms belong to "the jargon of the common law," and the Code does not condescend even to pronounce them. It was a proceeding against the corporation itself which the Governor had under his care, and against forty-nine individuals, of two fierce parties, contending against one another for its management. The complaint does not charge them with any offense against the plaintiff, but with mutual injuries committed by one set of the defendants against the others; and these wrongs consisted mainly in bringing suits for what they respectively averred to be their rights, a course of conduct which the Governor (truly enough, perhaps) thought would result in no good to anybody.

Of course the defendants could not make up an issue either of law or fact between themselves, no matter how they might sever in their answers to the plaintiff. In the dark days of Kent and Livingston and Spencer, it was thought morally impossible to introduce evidence until there was an issue to which it might have some kind of application. But here the defendants were called in and permitted to fight one another to their hearts' content without pleadings or proofs, and the judge was wholly emancipated from that barbarous bondage which in past times would have compelled him to pronounce his decree *secundum allegata et probata*. The proceeding seemed sufficiently free from "technicalities." It was apparently not fashioned, like the injunction, on the principle of the bastinado, but rather modeled after that other form of Turkish justice in which the Sultan, when he finds a cause too difficult to be otherwise dealt with, sews up the stubborn disputants in the same sack and casts them into the Bosphorus to go down the tide together—which they generally do with a most edifying disregard for the rules of navigation.

This curious cause came on for hearing (which, in the nomenclature of the Code, is called a *trial*) at Rochester before Judge E. Darwin Smith, without a jury. It was argued by Mr. D. Dudley Field for one portion of the defendants and by Mr. Henry Smith for the other, the plaintiff apparently taking no part whatever; and it was decided in December, 1869. Probably nothing more severe has been said, or could be conceived, of Mr. Justice Smith's judgment than the laudatory words bestowed upon it by Mr. Adams. We quote them:

"There are cases where a judge upon the bench is called upon to vindicate in no doubtful way the purity as well as the majesty of the law; cases in which the parties before the court should be made to feel that they are not equal, that fraud is fraud even in a court of law—that caviling and technicalities and special pleading can not blind



the clear eye of equity. It is possible that even a judicial tone may be overdone or be out of place. There are occasions when the scales of justice become almost an incumbrance, and both hands clutch at the sword alone. Whether the magistrate upon whom the decision of this cause devolved was right in holding this to be such an occasion is not now to be discussed; it is enough to say that his decision sustained at every point the Ramsey board, and crushed in succession all the schemes of the Erie ring. The opinion was most noticeable in that it approached the inquiry in a large spirit. Its conclusion was not made to turn on the question of a second of time, or a rigid adherence to the letter of the law, or any other technicality of the pettifogger; it swept all these aside, and spoke firmly and clearly to the question of fraud and fraudulent conspiracy. All the elaborate comparisons of watches, and noting of fractional parts of a minute, which marked the organization of the Erie meeting, were treated with contempt, but the meeting itself was pronounced to be organized in pursuance of a previous conspiracy, and the election held by it was 'irregular, fraudulent, and void.' The scandals of the law—the strange processes, injunctions, orders, and conflicts of jurisdiction—were disposed of with the same grasp, whenever they came in the path of the decision. The appointment of Fuller as receiver was declared to have been made in a 'suit instituted for a fraudulent purpose,' and it was pronounced in such 'clear conflict with the law and settled practice of the court' as to be explicable only on a supposition that the order was 'granted incautiously, and upon some mistaken oral representation or statement of the facts of the case.' The order removing the regular inspectors of election was 'improvidently granted' and was 'entirely void'; and the keeping it back by counsel, and serving it only at the moment of the election, was 'an obvious and designed surprise on the great body of stockholders.' The suit under which the Barnard order of arrest was issued against Ramsey and Phelps was instituted without right; the order of arrest was unauthorized; the order to hold to bail was 'most extraordinary and exorbitant,' and procured 'in aid of fraudulent purposes.' The injunction forbidding Ramsey to act as president of the company was 'entirely void.' The 3,000 shares of forfeited stock reissued to Mr. Groesbeck were pronounced 'valid stock,' and numerous precedents were cited in which the principle had been sustained. Even the injudicious subscription for the 9,500 new shares of stock by Ramsey and his friends, on which they had not attempted to vote at the election, was declared in point of law regular, valid, and binding. Upon the facts of the case the decision was equally outspoken; it was fraud and conspiracy everywhere. 'The importation and crowding into a small room' of a large number of 'rude, rough, and dangerous persons,' and furnishing them with proxies that they might participate in the proceedings of the meeting, 'was a gross perversion and abuse of the right to vote by proxy, and a clear infringement of the rights of stockholders, tending, if such proceedings are countenanced by the courts, to convert corporation meetings into places of disorder, lawlessness, and riot.' Finally, costs were decreed to the Ramsey Board of Directors, and a reference was made to Samuel L. Selden, late a Judge of the Court of Appeals, to ascertain and report a proper extra allowance in the case, and to which of the defendants it was to be paid."



It is not likely that Judge Smith will complain of this notice of his judicial merits, from the pen of a rapturous admirer. And yet, when we consider their import, how damning are these words of praise! "There are occasions," says Mr. Adams, "when the scales of justice become almost an incumbrance, and both hands clutch the sword alone." So there are indeed. Jeffreys thought so when into the west of England he carried terror and death among the unhappy peasantry who had followed Monmouth, and came back to his master red with the gore of the Bloody Assizes. Ananias the high-priest *approached the inquiry in a large spirit of disregard* for what Mr. Adams calls *technicalities* when he commanded them that stood by Paul to smite him on the mouth; but we must not forget the indignant rebuke administered by the great apostle of the Gentiles: "God shall smite thee, thou whited wall; for sittest thou to judge me according to the law, and commandest me to be smitten contrary to the law?" When Saunders was asked to pronounce an impartial judgment in the *quo warranto* against the corporation of London, *he thought a judicial tone might be overdone or out of place*. A military commission, organized to please the powerful and false accuser by hanging the weak and innocent victim of his malice, will admire the virtue of a civil magistrate who *made the parties feel that they were not equal*. "Judge Smith," says his eulogist, "did not make his decision turn on the letter of the law, or on any other technicality of the pettifogger." True enough; but is it not just possible that even a pettifogger, whose worst vice is adherence to the law, may be a safer sort of person in the land than one whose great glory is to trample it under foot? The fame of judges who throw away the scales, clutch at the sword alone, and smite contrary to the law, is not a possession generally coveted by men in ermine; but Mr. Adams's compliments apply not less to Jeffreys and Scroggs and Saunders, to Herod and Ananias, to Fouquier Tinville and Hunter and Holt, than to the man whom he describes as a judicial gladiator, fighting against legal justice on the side of Ramsey.

Mr. Adams's summary of Judge Smith's decision could have been much abridged if he had stated simply that this remarkable arbiter of men's rights pronounced everything that Ramsey had done to be valid and admirable, and everything done by those opposed to him dishonest, unlawful, and worthy of unmitigated reprobation. So far, indeed, did the largeness of his spirit carry him, that, to borrow the language of Mr. Adams, "*even* the injudicious subscription for the 9,500 shares of stock by Ramsey and his friends, on which they had not attempted to vote at the election, was declared in point of law regular, valid, and binding." There is a significance in the word "*even*" at the beginning of this sentence which implies very strongly that Mr. Adams had not expected so much as this from anybody on

the bench. Ramsey, reckless as he was, feared to tread where the headlong Smith rushed in. He was bold enough to fabricate the fraudulent stock, but he did not vote it, as he might have done had he dreamed that there was on the face of the earth a judge prepared to pronounce his fraud "regular, valid, and binding." It is not strange, observing the temper of Judge Smith's opinion, that, on the morning after it was published, he was secretly closeted with Ramsey's attorneys, and engaged, as he himself stated, "in looking over the findings of fact and comparing and adjusting them with his opinion." A single circumstance will show that this labor was not in vain. In the body of the opinion the judge declared, referring to Ramsey's secret issue of stock: "The subscription for the 9,500 shares by Hendricks, Hunt, and others, I think made them stockholders upon such stock of said corporation. They paid the ten per cent upon it, and *can not avoid the payment of the balance due upon such subscription.* The company has had the ten per cent, and the subscription was made in the regular subscription-book in the hands of the officers of the company, and created an absolute legal obligation to take the stock and PAY for the same." And in framing his conclusions of law, there was one inserted, as the original paper on file in his court shows, to correspond with this paragraph of his opinion: "That the 9,500 shares of stock subscribed for in the books of said company, by Jared Goodyear, Robert H. Pruyn, John Eddy, William A. Rice, Eliakim R. Ford, John Cook, Joseph H. Ramsey, James Hendricks, Minard Harder, and Harvey Hunt, whereon ten per cent was paid in money on the 5th day of August, 1869, thereupon became, and were, and still are, lawful and valid shares of the capital stock of said company."

It is needless to say that his Honor Judge Smith, when he wrote this "conclusion," and the passage in his opinion with which it was made to correspond, meant to do a very kind thing for the men of Ramsey's faction. Indeed, as we have seen, he was out-Ramseying Ramsey. The stock which he had pronounced "valid" was never intended to be taken or kept; the ten per cent paid on it had actually been "lifted" out of the treasury of the company; not a penny had been advanced by the nominal holders, and it was expressly understood that they were not to concern themselves about any future payments. Moreover, the stock had been created merely to serve an emergency which was now past. Nothing, therefore, could have been of more startling or disastrous import to Ramsey and his confederates than a judicial conclusion of law to the effect that they actually owned the shares for which they had subscribed, and were bound to pay the balance due upon them into the treasury of the company, to wit, the sum of \$855,000.

No wonder that when Ramsey's attorneys were employed "in looking over the findings of fact, and comparing and adjusting them with



the opinion," they made haste to correct this shocking blunder, and to rid their clients of the liability it would impose on them. It was too late to tinker the opinion, which was already in print, but the damaging "conclusion" was stricken out, and the judge, by this last and efficient bit of service, added nearly a million dollars' worth of thanks to the heavy debt of gratitude which the Ramsey people owed him already.

Everything being decided in favor of Ramsey, the judgment, of course, included a decree that he and his board were lawfully elected, although they had received a very small minority of the votes. The scales being discarded, the majority weighed no more than the minority.\* An order was accordingly made that Ramsey and his board "be immediately let into possession." The first thing they did was to put the property forever out of the owners' reach by a perpetual lease to the Hudson and Delaware Canal Company. This was not all or nearly all. Within one month after Ramsey and his board got possession, they voted to him, at his own request, and on his own dictation, two sums of money, amounting in the aggregate to \$62,802.25, and 1,330 shares of stock, worth at par \$133,000. If this was not a mere gratuity—a naked robbery of the stockholders—it was based on some transaction grossly corrupt; for Ramsey refused to explain the ground of it, and the board has ever since steadily resisted all efforts to investigate it.

This cause it took but little time to dispose of. In two months from the day when the stockholders were called into court—"two little months or ere those shoes were old"—they were turned out, despoiled of their property, and branded as fraudulent conspirators for trying to hold it. We would suppose that this could not be a very expensive operation. On a road at once so short and so rough, the tolls should not be heavy. The justice which the Church party got in Judge Smith's court ought to be a cheap article, since it has no other quality to make it desirable. But costs were awarded—extra

\* The statements both of Mr. Adams and Mr. Curtis are obscure concerning the votes given by the respective parties at the election. The important and leading fact, however, is well established, and not denied, that the Church party owned, and held, and voted nearly two thirds of the *bona fide* stock; and the Groesbeck stock was voted for them besides under an injunction of their opponents. Mr. Adams informs us that Ramsey did not attempt to vote any part of the 9,500 shares. If he voted only those *bona fide* shares which he held, and had a right to vote, his own return must have shown him in a very meager minority. But the court declared him elected. Whether this was done by throwing out of the count *all* the votes of the Church party, or by throwing out *only enough* to put them in a minority, or by *adding* to Ramsey's votes others which were *not cast at all* by either party, or by transferring votes *actually* cast for Church to Ramsey, for whom they were *not* cast, we have no information. All these modes of electing a defeated candidate are adopted when occasion requires by Philadelphia return judges, and sometimes they are very ingeniously compounded together.

costs—not in favor of the plaintiffs, nor against the defendants in a body, but against some of the defendants in favor of other some. An ex-Judge of the Court of Appeals was appointed assessor to aid in fixing the amount, and it was fixed at *ninety-two thousand dollars!* An economical nation might carry on a small war without spending more than it costs a private citizen to defend his plainest right in a Rochester court.

The Church party appealed to the General Term, where all the rulings of Judge Smith were reversed, through and through, except upon the validity of the election. That was affirmed, on the ground that he was *competent* to pass upon it; that is to say, he had legal authority which made his determination upon the point conclusive. How he got power to decide that or anything else between parties who were on the same side, and not at issue, we do not pretend to conjecture. But the Code especially delights in jurisdictional absurdities. This, however, has gone up to the Court of Appeals, *et adhuc sub judice lis est*.

If a dispute like this had occurred in a country where the principles and the rules of the common law prevail,\* it would have been determined easily and satisfactorily, without parade or trouble. An action at law would have brought the defaulting agent of the corporation to justice very soon; or a bill in equity would have called everybody interested into court at once, given them all a full hearing, and made a clean settlement of the whole matter. But here was a petty offender, strong only in the weakness of the law, who was able to defy justice and to triumph over it. The men whom he had wronged took after him with the Code: twenty-eight injunctions were exploded from different and distant parts of the State; the attack and the defense raised such an uproar that the framework of society was in danger of being broken; actual violence was commenced and extensive bloodshed was imminent; yet he retained his possession of all he took, and took as much more as he wanted. To drive this nibbling rat from the corporation cupboard, they gave chase with force and noise and numbers enough to hunt down a Bengal tiger, and the vermin was not dislodged after all. The Code is not a "terror to evil-doers," nor "a praise unto them that do well."

It is a rule of epic poetry that the story stops when the hero has reached the zenith of his fortunes. As the "Iliad" closes when the wrath of Achilles is appeased by dragging the body of Hector around the walls of Troy, and as the "Æneid" concludes abruptly when the death of Turnus makes Æneas master of Italy, so Mr. Adams closes

\* It can hardly be worth while to say that by common law we do not mean merely the ancient laws and customs of England, but those rules and principles which the first colonists transplanted here for the protection of life, liberty, and property, and which have since been modified from time to time as experience has proved to be necessary.



his account of Ramsey's high career at the point of time when his cheat upon the owners of the Albany and Susquehanna Railroad was completely successful. But Mr. Curtis, in his matter-of-fact production, carried the narrative a little further on.

Ramsey, being elated with his conquest of the Albany and Susquehanna, determined to invade the Erie, in hopes of subjugating that also. He was not a creditor nor a stockholder; but to give him nominal status, Groesbeck—the same Groesbeck—bought for him thirteen shares of stock and six bonds. With these he went to Delhi, the most secluded county town in the State, situated twenty miles from any railway line, and accessible only by mountain-roads. There he found Judge Murray, one of the thirty-three, and to him he complained that he was in danger of losing the money he had invested in these bonds and this stock, by reason of certain mismanagement of its officers and directors, the recital of which covered three hundred and forty folios. On this complaint the judge gave him, not merely an injunction, but a great quantity of injunctions; suspended a majority of the directors, appointed a receiver, restrained the suspended directors from making defense in this or any other suit involving their official conduct, commanded the unsuspended directors to see that the company was promptly represented by such counsel as they should select, ordered that no creditor but Ramsey should institute any suit to collect or secure his debt, and directed the defendants, under penalty of contempt, to bring no cross-suit which might embarrass the plaintiff in his prosecution of this one. Under these orders Ramsey managed to have the defendants *promptly* represented by a family connection of his own. When this destructive missile burst on the men of Erie at their New York office, it no doubt produced some terror. They immediately sought the ablest counsel they could find, and directed Messrs. Field and Shearman to adopt energetic measures of defense. But those gentlemen were informed that they could not appear, their clients being already represented by an attorney who had been selected for them, whom they did not know, and whose name even they were not permitted to learn. Nor could they discover who was the person appointed to take charge of their client's property, and exercise over it the unlimited control of a receiver. The alarm of the parties was greatly increased when they learned that their rights were to be in the keeping of David Groesbeck, the man who had aided Ramsey in all his previous frauds, and whose sense of moral and legal obligation may be learned from a fact stated by Mr. Adams; namely, that he defended Ramsey's fabrication of fraudulent stock and his appropriation of the Albany and Susquehanna Company's bonds, and "declared that under the same circumstances and fighting the same men he himself would have gone as far, and further, too, if necessary."

Here was such a case as no community living under any kind of a

code had ever seen before. All the property of a corporation worth sixty million dollars, and employing in its service the daily labor of twenty-five thousand hands, was snatched from the owners in the twinkling of an eye by an order made behind their backs, and all their rights and the rights of their employés and creditors were put at the mercy of a man who, speaking of these very owners, had openly avowed that in dealing with them he would be restrained by no moral principle; that fighting the same men he would betray the most sacred trust, clandestinely appropriate their property, make false papers to cheat them, and injure them otherwise by going still further if necessary. All these perilous notions of right and wrong were fully shared by the plaintiff, who had secured an attorney for the defense, and so made himself *dominus litis* on both sides. *Ex parte* injunctions had often before this torn men's property out of their possession without a hearing, but the Rhadamanthian justice of a subsequent trial was always conceded. Here the right to make even an *ex post facto* defense was taken out of their hands.

We see no reason to suppose that Judge Murray was not both a competent and an honest man. He acted according to the Code, which never refuses to do any amount of wrong if it can be put into the form of an injunction. But the Code itself could not endure such a pressure as this. Messrs. Field and Shearman, after much difficulty and delay, got on the track of the unknown person who was representing their clients, wrung the case out of his hands, and gained a position where the plaintiff was compelled to face them with his proofs. He broke down utterly, and his complaint was dismissed. Afterward he and his backers raised a clamor that he had been forced to trial with his hands tied. In truth, his hands were as loose as need be, but they were not clean enough to be shown.

The general question of *ethics*, which Mr. Adams raises, would tempt us to an extended discussion if we had unlimited space for it. As it is, we can not let the subject pass without saying that Brougham is not a leader fit to be followed, even in a matter so simple as every moral question must necessarily be to a man who believes in the New Testament. Brougham was nothing if not sensational, and before such an audience as he addressed in the Queen's case the impulse to be extravagant was more than he could resist. We prefer the higher and more ancient authority of Roger L'Estrange, whose "Character of an Honest Lawyer," written in the English of the seventeenth century, is at once accurate and epigrammatic. Supposing a candid seeker for truth to be still unsatisfied, let him read Sharswood's admirable book entitled "Legal Ethics," supplemented, if need be, with Redfield's article in the July number of the "American Law Register." The lego-theological side of the subject is presented by Judge Agnew, in his address to a Western college on the "Philosophy and Poetry of the



Law"; and the theologico-legal aspect is displayed by Sydney Smith, in his sermon on "The Lawyer that tempted Christ." That member of the profession who receives the spirit of these teachings into his heart, and acts accordingly, will be worthy of his high vocation while he lives, and to use the words of old Roger, "When Death calls him to the *Bar of Heaven* by a *Habeas Corpus cum Causa* he will find his *Judge* his *Advocate*, *nonsuit* the Devil, obtain a *Liberate* from all his infirmities, and continue still one of the *Long Robe* in Glory."

Disdaining the advantage of Brougham's eccentric theory, and trying Messrs. Field and Shearman by the severer standard of the better men whose works we have cited, what have they done to merit reproach? or wherein have they come short of their duty in all this difficult business? The only semblance of a specific accusation is, not that they took up an unjust cause, but that they were retained by a bad client. Mr. Adams thinks it very sensible and proper to make a grave exhibition of this charge, and to circulate it far and wide over the world; therefore (and only therefore) we are not permitted to say in plain terms that it is most absurd and wicked.

If no counselor can be concerned for Fisk and Gould in any case whatever without becoming infamous, it follows that no court can, without incurring a similar penalty, extend the protection of the law to their plainest rights. They are mere outlaws; they may be slandered, swindled, robbed with impunity, "and it shall come to pass that whosoever findeth them shall slay them."\* If this be consistent with the genius of our institutions, we have misapprehended those provisions of the fundamental law which declare that the courts are open to *all* men, and that *all* shall have a fair trial with counsel to assist them in getting justice.

This style of attack upon Mr. Field looks to us like a very unmistakable tribute to his good fame. The character of a lawyer must be more than commonly spotless when his enemies have no material for defaming him except what they get by raking about among the faults and follies of his clients. But that society is a very unsafe one to live in whose sense of justice will permit one man to be hunted down merely because the wolf's head has been placed on another. The reputation of lawyers—which is the life of their lives—will be extremely precarious, however virtuous their own acts may have been, if the concentrated odium of all their clients' sins can be cast upon themselves.

The Church party—that is to say, the proprietors of the Albany and Susquehanna Railroad—had a cause as just, legal, and fair as any court ever saw. They had been remorsefully plundered by a gang of reckless knaves, who made no secret of their intentions to repeat the robbery in the same as well as in other forms. Messrs. Field and

\* This was written and in the hands of the printers before the assassination of Colonel Fisk.—Ed.

Shearman accepted the retainer of these injured parties, and gave them the promise of such redress and protection as they could legally obtain for them. Now it is charged that this engagement to procure justice by legal means, in a perfectly upright case, was a prostitution by Messrs. Field and Shearman of their talents and influence, because one or two of the parties thus injured are supposed to have been previously engaged in other transactions in which they were themselves to blame. Whether this be true or false, it furnished no reason to Messrs. Field and Shearman for rejecting the case on moral grounds. If the cause, though just, was likely to become unpopular because Fisk and Gould were in it, that was an additional reason for taking it. Mere public clamor will not deter any honorable man from the performance of a duty; on the contrary, he is excited to higher efforts when "the heathen rage and the people imagine a vain thing."

That they behaved with scrupulous uprightness in the progress of the cause, and used no unfair means to reach the ends of justice, is a proposition which will not be denied unless by some who think that it is wrong in all circumstances to take out an *ex parte* injunction. Certainly the law which allows this mode of proceeding is entitled to no commendation. But while it is in full force it may be used for a proper purpose with a safe conscience. Every man is justified in defending the right against the wrong with such weapons as the law puts into his hands. Even L'Estrange's "Honest Lawyer," rigid as he is, "uses the nice snapperadoes of practice, in a defensive way, to countermines the plots of knavery, though he had rather be dumb than suffer his tongue to pimp for injustice, or club his parts to bolster up a cheat with the legerdemain of law-craft."

But then it may be said that Mr. Field, being the author of the Code, is responsible for the law itself, and for the mischief it produces in other hands as well as his own. The fact may be assumed too hastily. He is not the author, or supporter, or approver of that system which we have called the Code in this paper. Whenever we have said "Code," we meant the New York system of jurisprudence, a very small part of which was furnished by him. A piece of his work was taken and joined on the half-demolished ruins of the common law, and afterward there were added to both the outrageous provisions which have made such confusion and conflict in the jurisdiction of the courts. That he meant well by what he did has never, we believe, been doubted. If he erred, his error was shared by thousands of the best men and truest philanthropists in Europe and America; and the faith of many in "law reform," like that of Joanna Southcote's disciples in their "Shiloh," is robust enough to live on under all the discouragement of past failures. Let us hope that the pure benevolence of their efforts will meet its reward in the higher success of a far better reform, which may restore us to the golden age of the law.



The Code actually prepared by Mr. Field and the commission which he headed has not had a trial in New York. When a portion of it was torn from its context and united with a mutilated part of the common law, the symmetry of both was destroyed, and confusion became unavoidable. The Legislature, when they abolished the old forms of pleading, rejected the new forms with which Mr. Field proposed to supply their place ; these latter were scientific and logical, and would have saved much of the evil which has happened for want of them. It was the experiment, which has always failed, of putting new wine into old bottles. In some of the Western States they have tried the Code pure and simple, and very wise men are animated with the hope of its complete success. Mr. Field has no lack of adherents at home and abroad, who believe in the Code apparently on the principle of that Roman citizen who said he would rather be wrong with Cato than right with all the rest of the world. No doubt Mr. Field is a better man than Cato ever was ; but we are not "ravished with the whistling of a name," and therefore we say to all Americans who are still permitted to enjoy the blessing of the common law, that they should watch over that inheritance faithfully, and show no quarter to codifiers. Let them lay to their hearts the solemn warning of the Hebrew prophet : "Walk in the old paths ; stand upon the ancient ways ; observe them well, and be ye not given unto change."

J. S. BLACK.

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THE CHARACTER OF MR. SEWARD.—REPLY TO C. F.  
ADAMS, SR.

*To the Hon. Charles Francis Adams :*

AMONG a certain class of the American people a desire prevails that your "Memorial Address" on the late William H. Seward should receive a fuller examination than Mr. Welles has given it. His papers are very strong and clear ; but there are certain fundamental questions which he does not touch, and which the friends of constitutional government can not allow to be "washed in Lethe and forgotten." In my attempt to supply some of his omissions, I address you directly, because in that form I can best express my great respect for you while I try to expose the errors which I think I have detected in your address.

Your reputation for stainless integrity, for great talents, and for liberal principles, gives your words almost the authority of an oracle. There is, perhaps, no man in this country whose naked assertion would go further than yours, at home or abroad. If you have pronounced an erroneous judgment on an important matter, it should be subjected to a free revision.

This is an important matter. Mr. Seward was so connected with the greatest events of the last twenty years, that a misrepresentation of his life is a falsification of public history. Besides, he differed so widely from all his predecessors and many of his contemporaries, that unqualified approval of him implies the severest condemnation of them. Your own consciousness of this is betrayed in your harsh denunciations of those who committed no crime but that of being opposed by him. If Mr. Seward was not a wise and virtuous man—if he was unfaithful to his public duties—if his policy tended to the corruption of morals and the consequent destruction of popular liberty—if he was not true to the Constitution and laws which he often swore to execute—then you have done a most pernicious wrong in holding him up as an example for others to follow.

I hope I have made a sufficient apology for the presumption of which I seem to be guilty in declaring that your address is full of mistakes.

Your comparison of Mr. Seward to Pericles was rash and extravagant. A little reflection and another reading of Plutarch will satisfy you that the New York politician bore not the slightest resemblance to the illustrious Athenian whose transcendent genius as a military commander, orator, scholar, philosopher, lawgiver, judge, and jurist brought the greatest people of the earth to the summit of their glory in arms, in arts, and in literature. The difference could not be greater. As men they had something in common—organs, dimensions, senses, affections, passions—and each was remarkable in his way; but everything that distinguished them from the rest of the world equally distinguished them from one another. They were alike in no characteristic quality, moral or mental. There is not one parallel passage in their history. A true picture of Mr. Seward's life will not show a single feature which can be recognized even as a miniature likeness of any trait in that of Pericles.

It is easy to eulogize a man by appropriating to him the qualities of another whom history has already consecrated to the admiration of mankind. This cheap and compendious mode of dealing with the fame of an ancient hero or sage, by transferring it in bulk to a modern favorite, is often resorted to, and almost always fails of its purpose. Mr. Lincoln was said by his admirers to be a reproduction of Socrates; Robespierre was the Aristides of the French Assembly, and Klotz was Anacharsis. Congress and the State Legislatures are full of Catos. We have them among the directors of the *Crédit Mobilier*. I have heard Mr. Ames described as one who was *Catonior Catone*—more severely virtuous than the sternest of Roman censors. Your analogue is more absurd than any of these. You might as well have carried it out by showing that Mr. Thurlow Weed was the counterpart of Aspasia.



But Pericles is not the only famous man that suffers at your hands. Mr. Seward once put in the plea of insanity for a negro accused of murder ; and you pronounce his argument "one of the most eloquent in the language." The speeches of such men as Meredith, O'Connor, and Reverdy Johnson are nowhere ; and Erskine's magnificent defense of Hatfield is rivaled if not eclipsed.

Your claim of great professional ability for Mr. Seward is one of the most surprising you have made. The conviction is almost universal that he knew less of law and cared less about it than any other man who has held high office in this country. If he had not abandoned the law, he might have been a sharp attorney ; but he never could have risen to the upper walks of the profession. He would have been kept in the lowest rank, not by want of mental capacity or lack of diligent habits, but by the inherent defects of his moral nature. He did not *believe* in legal justice, and to assist in the honest administration of it was against the grain of all his inclinations. You yourself are frank enough to own that it was "not an occupation congenial to his taste," but that, on the contrary, "he held it in aversion." Being so constituted, it was impossible for him to tread the mountain-ranges of jurisprudence. He might as well have tried to be a great theologian without faith in the gospel. In fact, this was Mr. Seward's *côté faible* all through. If he had understood and respected the laws, he would have led a totally different life, and perhaps the general decay of our political institutions would not have taken place.

But let us go over the particular case of which you have given a most elaborate report, derived, no doubt, from Mr. Seward himself, or from somebody else who was decidedly his *comes* and *fidus Achates*. Your own facts and conclusions will show Mr. Seward's real grade as a lawyer, and at the same time test the value of your judgment upon his merits.

A negro was indicted for the willful, deliberate, and cold-blooded murder of a whole family. The proofs of his guilt were very clear, and the public mind was, naturally and justly, pervaded with a desire that he should suffer the punishment due to him by the laws of God and man. It was legally necessary that somebody should appear for him at the trial. But you say that this duty was made so dangerous by the excited state of public feeling, that when the trial was called all the crowd of professional men hung back in terror—all except William Henry Seward ; but he, defying the "enormous hazard," and taking his life in his hand, stepped forward and undertook the service. And this you declare to have been "a scene of moral sublimity rarely to be met with in the paths of our common experience."

The moral sublimity of this scene will cease to dazzle you when you recollect that no counselor ever exposes himself to the slightest danger by defending a criminal. There is no instance on record in which the public wrath, roused by a crime, has been vented in acts

of violence upon the counsel of the malefactor, for putting in truthfully and honestly the best answer he could to the charge. Even falsehood, though it provokes contempt, is largely tolerated because it can do no harm in a competent court. The assertion that Mr. Seward was in personal danger is contradicted by all experience in similar cases, and therefore wholly incredible. This acting as volunteer counsel for criminals was then, and has always been, as safe as it is common. The heroism of it in this case was an after-thought possibly of the hero himself—probably of the *comes*; certainly it did not come spontaneously into *your* head.

The dramatic interest of your story is further spoiled by the fact that he did not volunteer unexpectedly, at the moment when the cause was called, when everybody else was scared, and after the judge had become hopeless of getting an attorney bold enough to assist him in complying with the forms of law. In Mr. Seward's speech, as quoted by you, he referred to a preliminary hearing which lasted two weeks, and at which he had appeared for the prisoner. He was then publicly connected with the cause as fully as he was afterward. The knowledge of the whole bar that Mr. Seward was already concerned might have accounted to you for their silence at the trial, without the imputation of cowardice which your statement implies. It is not certain, but the inference is a fair one from all the circumstances, that Mr. Seward sought the case anxiously, as furnishing a desirable opportunity to display himself before the people.

The insanity of the negro at the time of the murder was the only defense Mr. Seward set up for him. It was utterly false. This is conclusively shown by the record. The jury was impartial, honest, and uncommitted by any previous expression of opinion; the ability and integrity of the judge are not denied; if any reasonable doubt of the prisoner's sanity had been raised by the proofs, his acquittal would have been perfectly certain. But the jury, upon their oaths, found him guilty, and the judge, satisfied that the verdict was right, pronounced sentence of death.

The sample of the argument which you produce shows that, instead of being able and eloquent, it was literally no argument at all. It has no application whatever to the subject-matter under consideration. It makes no allusion to the evidence, and does not refer, even in the remotest manner, to any rule or principle of law. It is a mere parade of his own magnanimous and disinterested benevolence, manifestly not intended to influence the tribunal, but to attract the admiration of the outside crowd to himself. Nothing could be more injudicious, in worse taste, or more out of place. The court and jury, having a case of life and death in their hands, and feeling the weight of their obligation to decide it rightly, must have listened to this irrelevant trash with painful impatience.



Mr. Seward, "nothing daunted" by the righteous judgment of the court and jury, "persisted in interposing every possible dilatory measure," and thus delayed justice from time to time until, at last, the negro died in prison. Then came the hour of his triumph. A *post-mortem* examination of the brain made by seven physicians "displayed indications of deep chronic disease." This, in your opinion, "clearly proved" that he "had been right from the start"; that is to say, Mr. Seward's assertion that his client was insane at the time of the murder, in a way which made him irresponsible for that crime, though contradicted by his actions during life, was established by the condition of his brain after death. Your acknowledged good sense, and that moderate amount of physiological science which you possess in common with all well-informed men, should have prevented you from believing this. The *post-mortem* indications of a brain-disease not immediately fatal are very obscure: supposing them to be plainly traced, no anatomist can tell how long or how short a time the disease existed; it may have existed, and it often does, without deranging the mental faculties in the least; no human skill can find anything in the matter of the brain from which a specific state of the mind can be inferred; and it is a monstrous absurdity to suppose that seven physicians, or seven hundred of them, could, by dissecting this negro's brain, demonstrate that he was afflicted with a particular form of mental insanity which irresistibly impelled him to commit murder two years before he died.

The sequel of this story, as you tell it, would show that Mr. Seward not only sacrificed himself, but magnanimously plucked down ruin upon his political friends. Your words are: "Here he was not only injuring his own interests, but those of the party with which he was associated. In vain did it labor to disavow all connection or sympathy with him. The press, on all sides, thundered its denunciations over his head. The elections all went one way. The Democratic party came sweeping into the ascendant. And all about the life of a negro idiot." These amazing facts were not known or suspected before you uttered them. The political history of our country has not instructed us that all the elections of that period turned upon the trial of a negro at Auburn, New York, or that one party was completely wrecked and another swept up to the seats of power merely because Mr. William H. Seward tried in vain to procure the acquittal of a murderer on false pretenses. It can not be true. The odium of his conduct, whatever that may have been, was all his own. It had no possible connection with any question at issue between the parties of the nation. It was as likely to produce an earthquake as the great political revolution which you assert to have been its consequence. The good faith with which you make the statement is not questioned; but it is such an outrage on historical probability as no prudent writer

of acknowledged fiction would adopt. Its extravagance would deform the plot of a romance. It shocks the mind of an intelligent reader like the narrative of a German novelist who tells how the peace of Europe was broken by a naval conflict on the Ohio River, between fleets of English cruisers and French merchantmen, in 1751, when, as every schoolboy knows, the Ohio had never felt the pressure of any craft heavier than a birch canoe.

It seems that Mr. Seward was, about the same time or a little before, employed for another negro—a convict in the State-prison, who had killed one of his associates. Here also the defense was a false one. You dispatch your account of the trial by saying: "The argument rested on the insanity of the prisoner. But it *carried no weight*." Within a month the convict was tried, condemned, and executed." What else could have been expected? Do you think this felonious murderer should have gone unpunished? If yes, why? Because Seward was his counsel? Because the defense was a false one? Or, simply because he was a negro? You say, in a mournful tone, that Mr. Seward's conduct in this matter "was not viewed favorably in the neighborhood." Are you not the most unreasonable man in the world to think that it should have been? Attempts to get criminals off by false pleas are often forgiven, especially when the fraud is defeated by the justice of the courts; but they are never regarded with approbation or favor by an honest community.

Mr. Seward's behavior in these two cases, though it hardly deserves the severe and universal condemnation which you say it received from all classes of the people who witnessed it, was, no doubt, very discreditable to a man of mature years who had held the highest executive office in his State. It must have prepared all who knew him to expect that his course as a politician would come to no good. That love of justice, that reverence for truth, and that high regard for the public safety which he did *not* display in his forensic efforts, are as necessary to a statesman as a lawyer. We will see if you have exaggerated his merits in one capacity as much as in the other.

He began his active political life with Anti-Masonry. A charge was publicly made that one William Morgan, a citizen of Western New York, had been forcibly seized by Masons and taken out of the State to prevent him from revealing the secrets of their society. To kidnap a freeman and lawlessly carry him away beyond the reach of *habeas corpus* or other relief was at that time regarded as a most atrocious crime, and the people in great numbers cried aloud for the punishment of the malefactors. A judicial investigation was obviously proper; the accused parties were indicted and tried. Mr. Seward took no part in the legal proceedings which were instituted to ascertain the truth of the charges and to punish guilt according to law. That was a business to which you say, with truth, "he had an aversion." He



set himself the task, "more congenial to his taste," of hissing up popular prejudice against those who were known to be innocent. A faction was organized which became locally powerful. He worked himself to the front of it, and was elected State Senator.

The managers of this political enterprise seem to have had no sincerity. They professed to believe that the country could not be safe until every Freemason was excluded from office and stripped of his influence; but, as soon as they could, they transferred themselves and their followers, without reservation of body or soul, to another party, which John Quincy Adams described as "a base compound of Royal Arch Masons and Hartford Convention Federalists, held together by no bond but that of a common hatred for better men than themselves." They fostered the growth of Anti-Masonry until it was large enough to sell—just as a dealer in live-stock fattens a calf until it is ready for the market, and then lets it go for what it will fetch. That Mr. Seward had any faith in the Anti-Masonic creed is rendered extremely doubtful by the alacrity with which he entered the service of the "base compound," and the rewards he took for doing so. If his indignation was actually excited by the abduction of Morgan, he must have got bravely over it before he boasted to Lord Lyons of his own exploits in the kidnapping line. The just and reasonable as well as the charitable conclusion is, that on these, as on other subjects affecting the rights of his fellow-citizens, he had no convictions whatever.

You are out in your chronology when you say that Anti-Masonry made him Governor of New York for two terms, unless you mean to credit Anti-Masonry with what Whiggery did in pursuance of the bargain and sale. But in fact Mr. Seward, before his election as Governor, had shown the flexibility of his political principles by supporting Masons as heartily as he had ever opposed them. It can not be said that he was not true to the Whigs as long as he was with them and of them, or that he did not earn the promotion they gave him. He went through thick and thin for tariffs, banks, internal improvements by the General Government, distribution of surplus revenue—all their superstitions; and in 1840 he kindled in the general blaze of enthusiasm for hard cider and coon-skins. He never once broke faith with them by discountenancing any partisan slander which could weaken the Democracy in its desperate struggle to preserve, protect, and defend the Constitution.

There is no evidence that he ever contaminated his fingers with base bribes, or put into his own pocket the wages of any special iniquity; but Mr. Welles's statement is undeniably true that he was intimately associated with the leaders of the most corrupt rings at Albany and Washington, and devoted much of his parliamentary skill to the promotion of their schemes, while they in return were the most efficient supporters he had for the presidency. As a public debater he was

distinguished almost exclusively by elaborate efforts to propagate those licentious doctrines which have since demoralized the public service and put common honesty out of countenance.

One incident which you mention is so characteristic of you and him both, that it must be adverted to. In 1848 the Buffalo Convention nominated Mr. Van Buren and you as candidates for President and Vice-President, against General Taylor, the Whig, and General Cass, the Democratic candidate. Mr. Seward professed to believe most devoutly in your anti-slavery platform. Nevertheless he voted and spoke for General Taylor, "a planter holding many slaves in one of the richest cotton-producing States." You were astonished and grieved at this inconsistency, which "seemed at first blush too preposterous to be countenanced for a moment." You have puzzled over this mystery ever since, in the belief that some solution might be given creditable to his patriotism and sincerity; and your explanation is still very far from a clear one. You do not go the right way about it. Your mistake consists in looking for the motives of his conduct among those high public considerations which would have influenced your own in a similar situation. The riddle is easily read. You have only to remember that Whiggery was strong enough to make him a Senator in Congress, for which he was at that time a candidate, while you could do nothing for his personal interest. Would he go out empty-handed from a party which was able and willing to give him his "back pay," for the sake of uniting his fortunes with a forlorn organization like yours? Would he "leave that mountain to batten on this moor"? Was it not "preposterous" in you to expect such a sacrifice? You thought, like Othello, that he "should be honest"; he believed, with Iago, that he

"Should be wise, for honesty's a fool,  
That knows not what it works for."

It is now more than time that we turn to his achievements in the field of national politics, and especially to his dealings with the Southern States on the slavery question. Thanks to your researches and your candid account of the result, we are at no loss to understand the character of these measures or the animus with which he advocated them.

You inform us that long before he became Senator he made a speech at Auburn in which "the *deliberate claim* of a right in the *Federal Government* to emancipate slaves by *legislation* was not less remarkable than the *miscalculation* of the force of the *passions* which led the South, in the end, to the very step that brought on the predicted consequences." The miscalculation you speak of was thus set forth by Mr. Seward himself in the speech from which you quote: "The South," said he, "will *never*, in a moment of resentment, expose themselves



to a war with the North while they have such a great domestic population of *slaves* ready to embrace any opportunity to assert their *freedom* and inflict their *revenge*." In other words, Federal legislation on the domestic concerns of the Southern States, however unjust it might seem to the Southern people, would be quietly submitted to by them for fear of a Northern war accompanied by negro insurrection and massacre. This brilliant and humane conception wins your approval, and proves, in your opinion, that Mr. Seward had a special genius for administering government in a country of laws.

With these views he came into the national councils, and made it known without delay that the experiment was to be tried incontinently. At the very outset of his career in Congress he began to press the bloody cup to the lips of the South. As soon as he had a voice in the Federal legislature he announced that emancipation was near and inevitable. It might be peaceable or violent, and every effort to hinder or delay it "would tend to the consummation of violence." He would hear of no compromise and offer no terms to the South. For them there was but one alternative: submission or death. This mode of beginning his senatorial duties, persistently followed up, made him your *beau-idéal* of a great statesman: far superior to Clay and Calhoun, who "equally relucted" at his policy; and towering high above Webster, who "never could make up his mind to meet it fully in the face," because he saw there the Union broken into dishonored fragments and the country drenched with fraternal gore.

By many persons who knew him well, these ferocious demonstrations of hostility to the public peace, the Union, and the Constitution, were regarded as the claptrap of a mere demagogue; shams intended to cajole the ultra-abolitionists, and flatter their cruel rapacity with hopes of blood and plunder which would never be gratified. Those who held this opinion, while they did not think him a dangerous man, had a most unspeakable contempt and detestation for his character. But others took him in a more serious way. Southern men especially believed it unsafe to despise his threats of pain and ruin. They watched his gathering strength with dread and terror, and, when his fortunes culminated in the possession of supreme authority, they felt that their hour had come.

You found it easy enough to say that he was the greatest of American statesmen, and that he proved it by proposing such legislation as this. But consider a moment whether it was consistent with any true idea of wisdom or justice.

You will concede the simple point that Congress had no jurisdiction over the subject of slavery in the States. What he contemplated and desired and worked to accomplish could not be done without a *fraudulent breach of the trust* on which he and all others held and exercised the powers of the Federal Government. The practicability of

carrying out the usurpation was based on the assumption that the Southern people would choke down their resentment and submit tamely to be stripped of their constitutional rights; and this you admit to have been a *miscalculation* of the passions which would be roused by the attempt. It follows that Mr. Seward's political *chef d'œuvre* consisted merely of a fraud and a blunder compounded together. Have you not proved your great statesman to be alike destitute of principle and prudence?

He pleaded "the salutary instructions of economy and the ripening influences of humanity" in favor of his measures. These "instructions" and "influences" have probably made so deep an impression on your susceptible heart, that you are willing to condone both the fraud and the blunder for their sake. You will not assert the infamous maxim that the end justifies the means; but you have made up your mind that Mr. Seward's object in legislating on the internal affairs of the South was, in itself, so beneficent as to make a breach of his fidelity to the Constitution a venial sin if not a virtue. And you think the passions of the South were so monstrous and unnatural, that to miscalculate and ignore them was not a very bad mistake, after all.

But look a little further. The Southern people sprang from a race accustomed for two thousand years to dominate over all other races with which it came in contact. They supposed themselves greatly superior to negroes. Most of them sincerely believed that, if they and the Africans must live together, the best and safest relation for both that could be established between them was that of master and servant. They thought it could not be abolished without a revolution disastrous to their material prosperity and fatal to their social organization. They did not think it sinful. The Bible furnished evidence satisfactory to them that God himself had framed a constitution and laws for his chosen people, which made Israel a pro-slavery commonwealth as much as Virginia or South Carolina. Their religious teachers had told them for many centuries that the canons of the Christian Church did not oppose it, but would hold them morally responsible only for the abuse of the power it gave them. They knew that the fathers of the republic, and other men, the best and greatest of all the ages, had lived according to this faith and taken it with them "through the valley of the shadow of death." Some of them believed it a dangerous evil, but did not see how to get rid of it. This last class were especially resentful of outside interference. They felt, as Jefferson did, that they "had the wolf by the ears"; they could neither hold on with comfort nor let go with safety; and it made them extremely indignant to be goaded in the rear. In all that country, from the Potomac to the Gulf, there was probably not one man who felt convinced that this difficult subject should be deter-



mined for them by strangers and enemies. Seeing that we in the North had held fast to every pound of human flesh we owned, and either worked it to death or sold it for a price, our provision for the freedom of *unborn* negroes did not tend much to their edification. They had no confidence in that "ripening influence of humanity," which turned up the whites of its eyes in horror at the sight of a negro compelled to hoe corn or pick cotton, and yet gloated over the prospect of insurrection and massacre. They were nearly unanimous in the opinion that this Yankee intrusion into their affairs was prompted by rancorous hatred of the white people, or that it proceeded, at best, from that monkey-like spirit of mischief which is never content without thrusting its unwelcome nose into somebody's kitchen or somebody's church. They had a tradition among them that it was not *their* fathers who brought the Africans to this country. They charged the cruelties of the slave-trade and the horrors of the middle passage upon the English and the Yankees; the planters merely received the savage negroes, tamed and domesticated them, taught them to work, converted them to Christianity, organized them into churches, and generally did more to improve their condition, materially and spiritually, than all the missionary societies that ever existed. Moreover, they had a suspicion that if they gave up their right of self-government on this subject, all their other rights would be taken away; once placed without the pale of constitutional protection, their Northern enemies would cut them up root and branch.

Of course, I admit that in all this the Southern people were blindly wrong. They should have understood their Bibles differently. They ought to have known that the negro was at least their equal, if not their superior. They were besotted not to see that Northern abolitionists were the "wisest, virtuouses, discreetest, best" of human beings, whose tender hearts were always overflowing with pure benevolence, and who wished to control the local governments and domestic business of the South, not for their own profit or pleasure, but solely in the interests of God and morality. If they had seen things, as you see them, in this true light, they would have surrendered their right of self-government upon the first summons. But they *could not* so understand the business. It was with them simply *non possumus*. The faith of a people, delivered and kept from generation to generation for thousands of years, can not be changed in a moment. Independence, bravely won and long established, is not often given up without a struggle. Burke, speaking of these same communities, warned the British Parliament that slaveholders were, by their very habits of masterdom, made more vigilant, jealous, and hardy than other men in the defense of their own liberties. Everything was unpropitious to the spread of your doctrines among them. There was not a population on the habitable globe less prepared than they were to appreciate



the duty of passive submission. You must not judge them by yourself, or apply to them the lofty standard of your own conscience. You contemplated things from a different point of view, and had means denied to them of understanding their religious and political wants. Even yet they can not see as you do the infinite blessing they enjoy in being subjected and abjected to Yankee rule.

It has been ever thus. A sinful people can never appreciate the holiness of the strangers who kill and rob them for their good. Philip II and the Duke of Alva determined to lay the Low Countries waste, and extinguish the heresies of the people in their own blood. This was to save their souls. The king expressed the object in his tersest Latin: "*Malo regnum vastatum quam damnatum.*" But the Dutch "relucted" at this mode of salvation as much as Clay and Calhoun, and the whole population "in a moment of resentment" determined to "die in the last ditch." The righteous souls of the English Puritans were vexed from day to day that Catholicism should exist in Ireland. It was "a relic of barbarism"; it was a "blighting curse"; there was an "irrepressible conflict" between it and the great truths which Puritanism had adopted. So the Puritans, impelled like you by disinterested zeal in a great cause, and not at all by avarice or hatred, plundered the Irish, killed them by thousands, took possession of their churches, banished their native leaders, and set up a government of strangers to tax, tithe, confiscate, and impoverish them. The Irish resisted this—fought it for centuries—and to this day they can not understand the purity of the Puritans.

I admit that passions like these—so ineradicable and so deeply seated in the nature of man—should not be wantonly provoked. Certainly the magistrate or Senator who bases his public policy on a "miscalculation" of them, is not fit to bear the rule of any country. The miscalculation of *your* statesman was so gross and palpable, that it excites our special wonder how any man of common understanding could have made it. The wanton violation under any circumstances of a compact so sacred as that embodied in the Federal Constitution was alone sufficient to produce some feeling. To violate it for the purpose of breaking up important domestic relations in fifteen States, against the will of the States themselves and of all their people, was a most aggravating outrage. But to follow this with a declaration that it would be enforced by a negro massacre, incited and led by the authorities of the government which the victims themselves had built up to protect them, was calculated to make the coolest blood boil over. You yourself tell us that the neighborhood of Auburn was "intensely and not unnaturally excited" by the act of a single negro in the murder of a single family. What, then, must have been the natural indignation of Southern communities when they heard themselves threatened with a general slaughter? Yet Mr. Seward, in counting



the consequences of his measures, left all these passions out of his calculation. It is hard to conceive how the dishonesty of breaking a political trust could be coupled with folly more extreme.

Mr. Seward's reputation must rest forever on the three things which made him especially notorious all the world over. His fame, so superior, in your opinion, to that of the men who framed our laws and administered them faithfully for three quarters of a century, was not won as they won theirs. He was remarkably defective in nearly all the qualities which gave so much grandeur to their characters. But he was unquestionably greater than any or all of them put together on "The Higher Law," "The Irrepressible Conflict," and "The Little Bell." Of these, you touch the first in a gingerly way, and avoid all mention of the other two. If his theory and practice on these points are indefensible, you wronged your country and yourself by calling him a public benefactor and setting him up as "a light and a landmark" to guide his successors.

Your reference to the higher law might be considered evasive if it were not yours. You will excuse me, I am sure, for saying that your attempt to explain it, and your sneer at the opposition it met with as a mere "outcry" against an "obvious truth," show that you understand nothing about it. I transcribe your words :

"It was in this speech also that he enunciated the doctrine of a higher law than the Constitution, which gave rise to an infinite amount of outcry from even a very respectable class of people, who were shocked at the license thought to be implied by such an appeal. But it seems to me that no truth is more obvious than this : that all powers of government and legislation are closely restricted within a limitation beyond which they can not pass without being stripped of their force. This limitation may be purely material or it may be moral ; but, in either case, its power is similar if not the same. It is a familiar story which is told in the books of Canute, the great Danish conqueror of Britain, that once, when his courtiers were vying with each other in magnifying their sense of his omnipotence, he simply ordered his chair to be approached to the advancing tide of the ocean and loudly commanded the waves to retire. The flatterers understood the hint, and were abashed by this withering illustration of the 'higher law.'"

From this it is apparent that you suppose the assertion of the Higher Law to have been a mere warning against attempts of legislation and government to overstep the material or moral limitations which would strip them of their force. But this is a palpable misconception.

You will surely admit that there never was any question nor any argument *pro* or *con* about the powers of government and legislation to work miracles on the material creation. Did Mr. Seward think it necessary to deny that an act of Congress could make the sun change its appointed time for rising and setting, or "bid the main flood bate

its usual height," or invert the force of gravitation so that the rain would fall upward and the smoke tumble down? Never since the beginning of the world did such thoughts enter a sane mind. That the courtiers of King Canute affected to believe in his power to stop the waves by a royal order, and that he proved the contrary by actually trying the experiment, is a childish fable, never treated as an historic fact, much less as a "withering illustration," by any grown man except yourself.

Your interpretation of the Higher Law as operating to fix moral limitations to legislative power is equally inaccurate. You say that the limitation to legislation "may be either purely *material* or it may be *moral*; but, in *either* case, its power [i. e., the power of the limitation] is *similar*, if not the *same*." Here you mean, if you mean anything, that a rule of civil conduct, enacted and prescribed by the supreme legislative authority of an established State, is as powerless if opposed by a moral objection as if it were in conflict with a material force. You think it safe to affirm that the mere iniquity of a law does, *propria vigore*, defeat the intent of a lawgiver, in the same way that the winds and tides are said to have defeated Canute's proclamation to the waves of the Northern Ocean. Reason and history both contradict you. From the days of Nimrod to the time of Grant, mankind have been governed by laws as bad as the cruel perversity of their rulers could make them; but, so far from being ineffectual, the nations of the earth have groaned under them and struggled against them in vain. Many recent enactments of Congress are open to the gravest moral objections, but no jot or tittle of them falls to the ground for that reason. The infamous combination of Yankee and negro thieves who now have the government of the Southern States in their hands are every day using their power to oppress and plunder their subjects in ways which shock all sense of justice; but their laws are remorselessly executed; right is overborne, and wrong revels in its insolent triumph. Here in Pennsylvania a similar class of miscreants have for years been preying like vultures on the prostrate body of the Commonwealth. It would be a delightful discovery to find that their enactments are stripped of all force by the self-acting power of the moral limitations which they transgress. But we have no hope of such relief, or any relief at all. Only the other day, in a convention to reform the Constitution, an effort was made to provide for the annulment of future immoral laws upon judicial proof of bribery and fraud used to procure their passage. The convention voted it down. Your fellow-disciples of Mr. Seward who lead us here not only deny that there are any moral limitations to the powers of government and legislation, but they believe that none ought to be imposed even in the grossest cases of the worst laws, known to be passed by the most open, shameless, and impudent corruption.



The Higher Law doctrine is not an assertion that the powers of government and legislation are subject to material or moral limitations, or any limitations whatever. On the contrary, it spurns even the limitations of the Constitution, and asserts the right of the ruler to pass all boundaries which his physical force is strong enough to throw down.

In words perfectly free from ambiguity, and by a long series of public acts which admit of no doubtful construction, Mr. Seward taught disobedience to the Constitution as a duty, and contempt for it as a patriotic sentiment. This principle (if it be lawful to call it a principle) was adopted, avowed, and acted upon by his party with almost entire unanimity, whenever and wherever they found their wishes opposed by a constitutional interdict. By him and by them the old notion that the law of the land ought to be obeyed was scoffed at; and the practical assertion of a legal right which they desired to invade was, in cases without number, punished as a crime. This is the Higher Law which you must vindicate if you desire to prove Mr. Seward a statesman.

He did not propose to substitute another rule of conduct, derived from higher authority, in place of the system established by our fathers. It is not the will of God as revealed in his word that was to be obeyed. The Higher Law, as expounded by his school, is, theoretically and practically, above all law, human or divine. It looks down upon the Decalogue with as much contempt as it does upon the *habeas corpus* act. It has no more respect for Moses than for Washington. Those who received it earliest and worked hardest to propagate it were notorious for their ribald abuse of Christianity. When they met periodically, at Framingham and elsewhere, to proclaim the Higher Law, their invectives against the Constitution were accompanied by blasphemies against God too shocking to be repeated. They had men among them who professed to be Christian preachers. How many were wolves in sheep's clothing, and how many sheep in wolves' clothing, I know not; but the leading one said that their object was to be accomplished by the ruin of the American church as well as the destruction of the Federal Government. The doctrine was also supported by Christian statesmen; but you know, of course, that recent evidence proves their religion to have been a mere disguise. In fact, the Higher Law, in its whole character, is so directly in conflict with every precept of the Bible, that no man who has the least respect for one can possibly believe in or practice the other.

This Higher Law, scouting the law of God and man—what is it? It is simply not law at all, but license to use political power in any way that will promote the interests or gratify the passions of him who wields it. It tells those who administer the Government that they *may* do whatever they *can* do. It abolishes all law, and puts in its place the mere force which law was made to control.

"Jura negat sibi nata; nihil non arrogat armis."

How thoroughly it disregards the *rights* of men, and how exclusively it respects the *mights* of men, is seen in the whole history of its administration by Mr. Seward himself. His first enunciation of it was connected with his movement against the South. That part of the Union, being encumbered by its negroes and afraid of them, was too weak to defend its constitutional rights, and might, therefore, become the prey of the spoiler. He never once kidnapped a citizen until he had the organized physical force of the nation at his back. His victims were powerless men and women, who had no defense but their innocence. His great diplomatic achievement which you vaunt so loudly illustrates the rule clearly. Mason and Slidell were captured from a British vessel in plain violation of public law. But if there was a law higher than the Constitution and higher than all laws of God and man, it must also be higher than the law of nations. Why should not the Higher Law "have free course to run and be glorified" on sea as well as on land? The President could not see his way through these logical difficulties, and the Cabinet was all in a muddle. Mr. Blair denounced the conduct of Wilkes as an indefensible outrage which would be sure to make trouble, while Mr. Seward was as much delighted as if one of his deputy kidnappers had broken the head of an honest judge or dragged an independent editor to prison. But he remained in this frame of mind only as long as he supposed that England could not or would not resent the injury. He understood his own code well enough to know that it did not apply to a case in which the right was defended by a force strong enough to repel the wrong. When, therefore, England armed herself and uttered her stern demand for immediate reparation, his whole tone was changed. He not only backed squarely down, but he signalized the humiliation of the Higher Law by long-winded and superfluous praises of legal justice—

"... mouth-honor, breath,  
Which the poor heart would fain deny, but dare not."

This feature of Higher Law was kept in mind by the Administration afterward. When the publishers of the Chicago "Times" showed their pluck by resisting a tyrannical order, and the people rushed to their rescue, the decree was revoked. The Higher Law invades only the rights of the weak and the defenseless.

Called by other names, the Higher Law was practiced often before it was introduced here. Amurath securing his throne by killing all his brothers and uncles; Herod slaughtering the innocents; Nero persecuting the Christians; Madame de Pompadour filling the Bastille with victims of her petty spite; Lola Montez setting her dogs on the students at Munich for doubting the political wisdom of the king's



mistress—all these acted upon the same kind of law that Mr. Seward declared to be higher than the American Constitution. It reduces free government to a personal despotism. The citizen who voluntarily submits to it is a slave in his soul.

It will not do to say that the Higher Law was set up merely to meet the exigencies of the war, and had but a temporary reign. That Mr. Seward stabbed the Constitution in the back only after secession had struck it a blow in the face, would not be a valid excuse if it were true, nor a true one if it were valid. In point of fact, the Higher Law was proclaimed, urged, and advocated by him and by others as early as 1850, at a time of profound peace, and without reference to wars or rumors of wars. Its worst acts were done before the war, after the war, and at places where war never existed. In 1867, two years after the peace, it embodied itself in the "reconstruction laws," which did not leave one single provision of the Constitution unviolated. At the present moment it is adhered to with as much tenacity as ever. Do you know any member of the dominant party who abjures it, or professes to have been converted to the doctrine of legal obedience? Have you the least reason to doubt that the abolitionists would tomorrow unite in a compact body to trample down the plainest constitutional rights of their opponents, North or South, if that were necessary to win supreme power, to retain possession of it, or to quell a dangerous opposition? They may act within the forms of law for their own convenience and safety; but where law that can be overborne stands in their way, what reason is there to believe that they will respect it? Let me tell you a fact. In 1865, months after the peace, at the political metropolis of the nation, in full sight of the Executive Mansion, the Capitol, and the City Hall, where the courts were in session, a perfectly innocent and most respectable woman was lawlessly dragged away from her family and brutally put to death, without judge or jury, upon the mere order of certain military officers convoked for that purpose. It was, take it for all in all, as foul a murder as ever blackened the face of God's sky. But it was done in strict accordance with Higher Law, and the Law Department of the United States approved it. Now, mark you: within less than three months last past the present Attorney-General officially referred to this as a precedent entirely fit to be followed. This may not be very important in itself, but it is significant as showing that the reign of Higher Law is not over yet. Can you promise that it ever will be? Is there not reason to fear that this doctrine has poisoned all the streams of justice?

In every institutional government, whether it be a republic or a limited monarchy, the delegation of its powers is coupled with an express condition that they shall be exercised only in a prescribed way, and within certain defined limits. The violation of this condition,

under any pretense whatsoever, has always, everywhere, and by all tolerably honest men, been regarded as a base and treacherous breach of the most sacred trust that can be confided to human hands. Among us no man can get possession of any official authority without first making a solemn covenant with God and his country that he will be faithful to the fundamental law, and he must seal that covenant with an oath. Can anything be more damning than the doctrine which teaches men to seek office and take this oath with a predetermination to break it? Is any species of willful, deliberate, and corrupt perjury at once so debasing and so mischievous?

Yet the author and finisher of this atrocious faith is your model of a statesman. You find your highest standard of political orthodoxy in his precept and his example. The men who made the Constitution and took it as a lamp to their feet and a guide to their path command none of your respect. Jefferson, the great apostle of liberty secured and regulated by law, is summarily set aside, and his "modern disciples" who have kept their oaths are "cast into deep shadow" by the founder of an opposing school which makes systematic perjury the corner-stone of its policy. The expression of such sentiments by a man like you is a deep injury to the cause of liberty and justice.

You know what the Irrepressible Conflict was as Mr. Seward uttered it at Rochester. I present an analysis which you will admit to be accurate. He announced that—

1. There was then a *conflict* between the North and the South—not merely a conflict of interests, opinions, and feelings to be determined peaceably by reason or law; but—

2. It was a conflict between the *opposing forces* of the Northern and Southern States. Actual war already existed; the relation of the parties was that of belligerent enemies.

3. The determined purpose of this war, on one side, was to *plant* slavery in the *North* by force, and, on the other, to abolish it in the *South* by similar means. This, of course, involved the complete subjugation of the defeated party.

4. The conflict was *irrepressible*. The dogs of war were loose, and *could not* be chained up again.

5. The conflict *should not* be stopped; it *must* go on until all the rights of one section should be trampled down under the hostile feet of the other. Woe to the conquered!

You are, of course, aware that this was a mere invention. There was no such conflict as he described. The wish of himself and his party friends to visit the South with fire, sword, and famine may have been very strong, but the declaration that the Southern States were using their forces, or intended to use them, for the purpose of introducing African slavery into the North, was such an offense against the known truth as admits of no palliation or excuse.



Yet it was believed and taken into the hearts of thousands and tens of thousands. Large bodies of men combined together in sects or parties are often excited to a kind of madness. In that condition their appetite for falsehood is unappeasable, and the gluttony with which they swallow it down is incalculable. One half the English people believed the transparent lies of Titus Oates about the "Popish Plot," and the other half did not dare to contradict it. "Know-Nothings" without number believed the frightful stories of Maria Monk and her coadjutors. And the abolitionists believed Mr. Seward. He understood them, and had taken the exact measure of their credulity. This time he made no "miscalculation of the passions" he would stir. Believing him, they saw in the South a cruel enemy preparing to crush out their domestic institutions, to subvert their State governments, and to smash up the whole framework of their society.

On the minds of the Southern people the effect was still worse. To my certain knowledge it made more secessionists than all other causes put together. To every persuasion we addressed them in favor of legal obedience, union, and peace, Seward's speech furnished an answer. How was it possible, they said, for them to obey a Constitution which we treated as a dead letter? Could one party keep a compact if the other wantonly broke it? "The Union! a conflict is not union; and, as to peace, your foremost man has told us that there is no peace." The terrible difficulties of their situation paralyzed their judgment. Exasperation took the place of that cool fortitude which had carried them through previous trials. Wisdom forsook their counsels. They gave up to their domestic foes the ship which they had often defended against foreign enemies, and trusted their destiny to secession—

". . . that fatal, that perfidious bark,  
Built in the eclipse and rigged with curses dark."

Did Mr. Seward know what he was doing when he started this Irrepressible Conflict? If he did not, how can you feel any respect for his judgment? But his newspaper organ at Albany (the "Evening Journal") said for him that he did intend what happened; and he himself, about 1865, bragged that he had privately predicted the battle of Gettysburg many years before the war broke out. The "Irrepressible Conflict" was, then, on his part, a cold-blooded and deliberate preparation for the sacrifice of life and property on a scale of enormous magnitude, involving men, women, and children of every class and color in the North as well as the South. You think him wholly unlike Cleon, as being vastly better. But what did that unprincipled tanner ever do, or propose to do, that was comparable to the atrocity of the Irrepressible Conflict? You will say, as you have said, that Cleon "stimulated the passions of the Athenians to the

massacre of the male population of Mitylene." But, remember, there were only about five thousand male Mitylenæans all told (less than two thousand actually suffered), and they were foreigners and enemies. On the other hand, that population which Mr. Seward "stimulated the passions" of the abolitionists and negroes to massacre were his fellow-citizens, living with him in the bonds of sworn amity, under a common Government, which owed equal protection to them and himself. Perhaps you will plead for Seward that the Southern people were slaveholders and "poor white trash" whom it was no harm to kill; but I reply, on the part of Cleon, that the Mitylenæans were slaveholders also. Your contrast between Seward and Cleon is almost as much a failure as your analogy between him and Pericles.

Before you asserted that Mr. Seward *saved* the country, you ought to have remembered that, if the nation had been saved from him and his followers, and the Irrepressible Conflict which they created, it would have needed no other salvation.

Now as to the Little Bell. The same Higher Law which gave the Federal Government power to legislate against the States in defiance of the Constitution would logically justify any executive outrage that might be desired for personal or party purposes on the life, liberty, and property of individuals. Such was Mr. Seward's theory, and such was the practice of himself and his subordinates and some of his colleagues. I will not pain you by a recital of the wanton cruelties they inflicted upon unoffending citizens. I have neither space nor time nor skill to paint them. A life-size picture of them would cover more canvas than there is on the earth. You were abroad as Minister to England when most of them were done; but every wind bore you the reports, and you must have blushed for your country when you saw her degraded in the eyes of the whole world. Since the fall of Robespierre nothing has occurred to cast so much disrepute on republican institutions.

When Mr. Seward went into the State Department he took a *Little Bell* to his office in place of the statute-book, and this piece of sounding brass came to be a symbol of the Higher Law. When he desired to kidnap a free citizen, to banish him, to despoil him of his property, or to kill him after the mockery of a military trial, he rang his Little Bell, and the deed was done.

This man, to whom you would assign a place in history above all other American statesmen, took a childish delight in the perverted use of his power, and displayed it as ostentatiously as one of those half-witted boys who were sometimes raised to the purple in the evil days of the Roman Empire. He boasted of it on many occasions, and crowed over the British Minister, telling him that his Queen could not do so much. Lord Lyons was dumb. Victoria had no Little Bell of that kind; she swore at her coronation to govern according to



the laws of the realm, and she must keep her oath. For more than two centuries no English monarch had tried the experiment of Higher Law on his people. Under Charles I, Strafford declared that "the King's little finger was thicker than the loins of the law"; but he was tried for this and put to death as a traitor. For, acting upon Strafford's suggestion, the people rose upon the King himself, dragged him to the block, and chopped his head off; and the God of justice looked down from his great white throne in the heavens and smiled upon the deed.

You may answer (as the disciples of your school generally do) that the men and women who have suffered under this tyrannous rule were mere Democrats, Copperheads, Union-savers, Doughfaces, Southern sympathizers, Bourbons who forget nothing and learn nothing, entertaining opinions out of date and unfavorable to abolitionists, dangerous voters, improper persons, whom it was decidedly advisable to take off; and, as that could not be done according to law, it was right to do it against law. I will not affirm that the Democracy had any merits, but ask you merely to recollect that a legal right is always respectable, even though the person who claims it does not stand high in your esteem. Besides, it was not expected that the party in power would oppress themselves. The law is, therefore, made to no purpose at all if it does not shield the weakness of their opponents. You can not understand the value of a free constitution unless you imagine yourself in the situation of a minority, under the Higher Law rule. Then you will see the other side of the question. To deprive Democrats of their hereditary rights and pen them up in dungeons by the thousand without jury-trial or *habeas corpus* may be no more than a fair concession to the "ripening influence of humanity," and to rob them is according to the "salutary instructions of economy"; therefore, these are pleasant employments for abolitionists. But there is a difference between doing and suffering. How would you like it yourself to be throttled by the minions of the Higher Law? If you had been kidnapped and imprisoned or beaten and robbed by the hirelings of executive malice, or insulted by a mock trial before a body of pliant tools "organized to convict," perhaps you might have learned to value the Constitution as highly as it is valued by the worst of the Copperheads. You would understand then how the Bill of Rights has come to be regarded as the gospel of the weak. It is even possible that you could in that case appreciate the admiration which Pitt expressed for *Magna Charta* when he said that three words of that bad Latin were worth more than all the classics. As it is, you have no special cause to dislike arbitrary power, and you can afford to admire the man who threw down the defenses of personal liberty. But you must not expect to be joined in this by that portion of the people who need the protection of a free government.

Mr. Welles presents the subject of your eulogy in a very unpleasant light. Instead of the sagacity, candor, and patriotism for which you credit him, he was cunning and treacherous, "to low ends industrious," and crooked in all his ways. I am no voucher for this; but besides Mr. Welles's own unquestioned veracity, and the circumstantial corroboration of his statements, there is a reason *a priori* for believing all he says, and more too; the man who was notoriously false to the Constitution he swore to support, could not be true to anything.

By Mr. Welles's paper it is distinctly made known that Mr. Seward, as soon as he came into office, concocted a scheme for the surrender of Fort Sumter into the hands of the secessionists; that he drew General Scott into it, and tried to get the President's assent also; that the President having declined to surrender, and determined to re-enforce the place, a confidential friend and *protégé* of Mr. Seward notified his confederates in the South of the movement about to be made; that the whole plan and arrangement of the Administration for the relief of the fort was brought to nothing by a series of secret, deceptive, and underhand manoeuvres which Mr. Seward carried on without the knowledge of the War or Navy Department; and that, while he was thus betraying his own associates, he wrote to secessionists that his faith pledged to *them* would be fully kept. These accusations seem to be proved by overwhelming evidence. I do not suppose that this will shake your faith in Mr. Seward's integrity and wisdom, or detract one atom from your admiration for the grand simplicity of his character. But suppose such a revelation to be made concerning a member of the Buchanan Administration, what would you say? Would you present him to the country as its best example of a statesman, or would you hang him up for the execration of the world? Would you sing pæans to his virtue, or "cleave the general ear with horrid speech" about his wickedness?

You were a member of Congress when the election of Lincoln took place, and your conduct between the election and the inauguration was supposed to justify the respect which was felt for you by all the true friends of the country. I thought your speeches were the best rebuke that could be given to the intemperate malice of your party, which adopted no policy but that of slandering the existing Administration. I am sorry if I mistook you, and, if I was right, I will not cite you against yourself, for the *argumentum ad hominem* proves nothing. But Mr. Seward's behavior during that critical period was not worthy of his place.

Your account of his situation at that time differs from his own. You say, in substance, that though he ought to have been *early secured in a post*, and other posts ought to have been filled under his advice, yet nothing was done for him until *quite late in the session*, when his friends were disposed to advise him to reject the tardy offer. But, on



the contrary, his own written declaration is that it *was early understood* that he was to be appointed Secretary of State, and that he was regarded as *representing* not only the incoming *Administration* but the *party* by which it was elected. It is certain that his *ego et rex meus* style of speaking about himself and Mr. Lincoln created a general belief at Washington that he would be the Wolsey of the new Administration, with

"Law in his voice and honor in his hand";

while others would be subordinate, and the President himself little more than a figure-head. In fact, he carried out this notion after he went into office, much to the disgust of his colleagues, as you may learn from Mr. Welles and Mr. Blair.

Holding a position like this, a word fitly spoken by him would have saved the country from a whole Iliad of woes. But he was narrow-minded, short-sighted, and destitute of the magnanimity needed in such a crisis. Instead of rising to the height of the occasion, he showed himself a mere politician. To tell what little things he did during that memorable winter would require a good-sized volume; but there lives not even in your partial remembrance one great act to mark him as a patriot or statesman.

Since you and Mr. Welles and Mr. Blair have put on record your personal reminiscences of him, I will add my contribution, believing that the fact I am about to mention throws a broader light on his public character than any which you have given.

When the troubles were at their worst, certain Southern gentlemen, through Judge Campbell, of the Supreme Court, requested me to meet Mr. Seward and see if he would not give them some ground on which they could stand with safety inside of the Union. I consented, and we met at the State Department. The conference was long and earnest. I can not, within these limits, set forth even the substance of it. He seemed conscious of his power, and willing to use it in the interests of peace and union, as far as he could without the risk of offending his own party. What could he do? Many propositions were discussed, and rejected as being either impracticable or likely to prove useless, before I told him what I felt perfectly sure would stop all controversy at once and forever. I proposed that he should simply pledge himself and the incoming Administration *to govern according to the Constitution*, and upon every disputed point of constitutional law to accept *that exposition* of it which had been or might be given by *the judicial authorities*. He started at this, became excited, and violently declared he would do no such thing. "That," said he, "is treason; that would make me agree to the Dred Scott case." In vain I told him that he was not required to admit the correctness of any particular case, but merely to submit to it as the decision of the

highest tribunal, from which there could be no appeal except to the sword.

You will see that if such a pledge as this had been given and kept, the war could not have taken place; it would have left nothing to fight about; and the decent men of the Anti-slavery party would have lost nothing by it which they pretended to want, for even the Dred Scott case had inured to their practical benefit. But Mr. Seward must have given up the Higher Law and denied himself the pleasure of kidnapping Democrats.

I had never before heard that *treason* was obedience to the Constitution as construed by the courts; but this prepared me to learn, as I did some time afterward, that the correlative virtue of *loyalty* consisted in trampling the laws under foot. What should the world think of the statesmanship which introduced these notions?

I do not know, but I believe, that Mr. Seward, in consequence of the conversation above mentioned, got Mr. Lincoln to commit himself in the inaugural by the absurd and mischievous declaration that he would *not* take his law from the Supreme Court, but *would* take it from the Chicago Convention.

Your address has undoubtedly done much to diminish what little confidence was left in the Government as a protection to our personal rights. We can not help but feel that the security of life, liberty, and property must be fearfully slender in a country where a citizen of your standing can openly say that the owner and tinkler of the Little Bell was a statesman whose example ought to be universally copied.

You are a leader of the party calling itself "Liberal Republican," whose platform is a protest against iniquity in high places, and whose movements are a struggle for the restoration of honest government. Your compatriots know, if you do not, that the evils they deplore were introduced by the man you advise them to imitate. The party you oppose for its hideous corruption has but fashioned its moral and political principles upon the model which you now declare to be full of beauty and goodness. Your personal consistency is nothing; but to go back in this way, not only on yourself, but on your friends and your country, is too bad.

J. S. BLACK.

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SPEECH AT THE CELEBRATION OF THE CENTENARY  
OF GRATTAN'S DECLARATION OF IRISH INDEPEND-  
ENCE, UNDER THE AUSPICES OF THE IRISH NA-  
TIONAL LAND LEAGUE, OF MARYLAND, AT CON-  
CORDIA OPERA-HOUSE, BALTIMORE, APRIL 18, 1882.

HE began by referring to some remarks of the mayor, and said he would not bandy compliments with him. Except for the fear of seeming to do so, he would then and there express his admiration of that gentleman's high career as Governor of the State and Senator in Congress, with some reference to the perfections of his administration as chief magistrate of the city.

My task (said Judge Black) is simpler than that which the mayor has performed so excellently well. It will consist in making as plain as possible the issues between the enemies of honest government and its friends here as well as on the other side of the water.

Are we, or not, required to do something for the relief of Ireland? This is a question on which, I think, no American citizen has a right to be silent. Therefore, and not because I would set myself up as a public instructor, I am where I am to-night. For seven centuries Ireland has worn the yoke of political bondage. During all that time, except one short interval, she has not been permitted to make any laws for the protection of her own people in their persons or property. What they call home-rule, or the privilege of local self-government, is wholly denied them. Their affairs are entirely directed by another power, whose orders are executed by agents and overseers sent upon them for that purpose. Such a government is sure to be administered without the smallest regard for the rights, interests, feelings, or wishes of the people who are subject to it. Enemies and strangers so fastened upon the community will certainly rule for their own pleasure, advantage, and profit. Any person who does not know this to be a fundamental fact, established by all human experience and underlying the whole science of government, is not at all prepared to consider this subject, and he had better give no further attention to it. But if he understands that much, he also knows that the want of home-rule in Ireland is the want of everything else. As a consequence of that privation she is oppressed, degraded, insulted, steeped in poverty to the very lips, and overwhelmed with afflictions, which make her peculiarly what Senator Bayard has called her—"the Island of Sorrows."

The general notion is that England and Ireland are united kingdoms; they are called so in the style and title of the Queen. But there is no real union, and there never was. There is a connection

made by force ; they are "pinned together with bayonets." Ireland is not governed according either to the common or statute law of England, but by special legislation made for her alone. An act of Parliament passed for the general benefit of the Queen's subjects does not apply to the Irish people unless they are particularly included by name. The old statutes and royal concessions to popular liberty are so interpreted as well as the later ones. Thus Ireland is construed out of *Magna Charta*, the Bill of Rights, and other great securities which make Englishmen safe against injustice. In effect, the British Government, which is a limited monarchy at home, becomes an unrestrained and absolute despotism when it crosses the channel ; and the exercise of this unbounded power through all the centuries of its existence has been marked with the coarsest cruelty and the most heartless oppression that this world has ever witnessed.

If the Irish had been inferior to the race which trampled them down, their fate would seem less hard. But, intellectually and morally, they were greatly superior ; their civilization, science, art, and general intelligence were much further advanced. The deliberate and long-continued effort of England to darken the mind of Ireland and reduce her people as much as possible to ignorance and illiterate barbarism is a most shocking part of the story. But I do not now propose to tell it ; or, indeed, to go back upon the past at all, more than is necessary to explain the existing state of things.

Undoubtedly much of the present trouble is directly caused by the unnatural relations existing between the millions whose labor cultivates the soil, and the landlords, small in number but great in power, who stand ready to snatch away the fruits of it as soon as they are gathered. Perhaps it does not make much practical difference how this domination of the few over the many was established, but it is some mental aggravation of the wrong to think that it had its origin in mere robbery. The Irish were themselves the owners in full property of the land which they now cultivate only for the benefit of their oppressors.

The first conquerors simply and unceremoniously appropriated the property. A forcible entry and detainer was held to be a good title, and the original owner was supposed to have lost his right merely because he was not strong enough to keep it. But the whole island was confiscated again and again, some of it five times over, before it got into hands rapacious and loyal enough to suit the policy of England. Then, however, the landlord system went into full operation. The great mass of the people were tenants, and every tenant was a slave, if it be true, as it certainly is, that the essence of slavery consists in making one man labor while another takes his earnings. A lease was a mortgage of the tenant's life and the life of his family, without the equity of redemption. It compelled him to work incessantly, with every limb stretched and every muscle swelled, from morning to night,



for "the bit and the drop"—that is, the smallest quantity of food and drink that he and his children could live on—with a thatched roof above them and a little turf on the hearthstone. Very often they did not get that. A month's sickness reduced them to hopeless want, and, if a crop failed, starvation carried them off by the thousand. Such has been the operation of the system, such it is at the present moment, and the English Government is doing all it can to perpetuate it.

You may say what you will about the sacred right of property—nobody believes it more devotedly than I do; concede that these landlords have a title which can not now be questioned; assume that an owner of property may rent it on the hardest terms he can exact—still, the existence of that gigantic monopoly, clothed with the privilege of desolating a country and starving the industry of a people, is the saddest fact in the history of the human race.

We must speak respectfully of England. The vast wealth of her commerce makes it everybody's interest to stand well with her. Her armies circle the earth; her fleets cover every sea; the long reach of her diplomacy perplexes where it does not control the councils of all other states. This is power, and power is always honored. It is said of Satan himself that he is "sometimes worshiped for his burning throne." But England has other and higher, if not stronger, claims upon our respect. Her literature is our own, and from her we derive much of our science and art. Englishmen framed the best of our laws, and our most valuable institutions are copied from theirs. *Magna Charta*, trial by jury, *habeas corpus*, and the Bill of Rights, are their inventions. We can not but remember that "Chatham's language is our mother-tongue," and the great name of Hampden ranks only second to that of Washington. Nor can we forget that the present monarch of that country is a Queen whose personal virtues have a richer value than all the jewels in her crown. But those ministerial tools of a greedy aristocracy, who have done and are now doing all that in them lies to oppress and wrong a people to whom they owe protection—are they fit to govern? No, not to live! If I had the voice of an "angel, trumpet-tongued," I could not speak their condemnation more loudly than the truth would warrant.

Except Ireland, all the nations of the earth have been making some progress. Improvements in political as well as physical science and the discovery of new arts have brightened the face of the civilized world, and given dignity, independence, and comfort to the mass of its inhabitants. But the condition of the Irish people is more wretched than ever. A single fact will show how frightfully true this is: During the last forty years the population of other countries has doubled; in some of them it has trebled, and the average amount of provision and clothing for each individual is two and a half times as great. But in Ireland, with a more genial climate and a soil incomparably rich, the

numbers have been reduced from nine millions to five ; and, of those who survive, the great majority are suffering the last extremes of want and necessity. Where are the other four millions and their multiplied offspring ? What has become of the additional twelve millions who, according to the natural rule, should be living there now in comfort and plenty ? Famine has thinned them out ; pestilence has swept them away ; political persecution has driven them abroad. What is the cause of these terrible calamities ? All men, with one voice, charge them upon that atrocious misgovernment which blights and curses them. When the blood of that unhappy people cries from the ground, the British tyrant can not answer like Cain, " Am I my brother's keeper ? " The rulers of a nation are its keepers, responsible for its fate, and these men have an awful account to render. For every false drop in their veins an innocent life has perished.

But if the Irish could not live by cultivating the soil, why did they not go to some other employment ? This is a pertinent question, and the answer to it covers England with an infamy that nothing else can match. In fact and in truth they did betake themselves to commerce and manufactures, and the hope was bright before them of a perfect success. But their English enemies ruthlessly broke up their business by penal legislation, destroyed their trade, both foreign and domestic, by arbitrary prohibitions crushed out their enterprise, and forced them back upon the land.

Then why don't they fight ? They have tried that too. They never sunk into tame submission. The most pathetic passages of history record the incidents of their struggle ; their rights have been asserted with surpassing eloquence ; the purest poetry in any language celebrates their valor. A long line of their most illustrious men have suffered martyrdom in the cause of liberty, and the common file of the people maintain a character for turbulent disloyalty which ought to excite universal admiration. Their spirit was never broken ; they lack no gall to make oppression bitter.

But each defeated effort to right themselves was made an excuse for the infliction of new outrages. Whole districts were depopulated by the process which they called a clearance—that is, the destruction of all habitations and the expulsion of all occupants, accompanied by circumstances of the direst cruelty. No chance was lost to hang or imprison a patriot. The higher he stood for talents and integrity the surer he was to be claimed by the scaffold or the dungeon. The yoke was tightened on all who were allowed to live and go at large. It was a mortal offense to meet and petition for the redress of grievances. Political opinions adverse to the government were sure to call down its wrath and malice. Even the fidelity of the people to their religious convictions, the highest virtue that can adorn any human character, was imputed to them as a crime, and punished so bar-



barously that it can not be thought of without detestation and horror.

I deny that this was in any true sense a conflict of religious opinion. Let no Protestant slander his church by asserting that its doctrines contain any warrant for persecuting those who dissent from it. No Christian man, with a conscience of his own, ever thought himself authorized to force the conscience of another. English bigotry was merely simulated to cover English rapacity. I admit that the penal laws aimed directly at Catholics—their worship prohibited, their priesthood hunted down, their churches taken from them, their schools suppressed, unarmed and helpless men, women and even children butchered on no charge but that of misbelief—these things did certainly look like sincere antipathy to the religion of the victims. But it was mere political piety, which is always a sham and a false pretense. For this judgment I can give you cogent reasons. In the first place, before any ecclesiastical division took place, the Irish were robbed and murdered as basely as they were afterward. Secondly, at all times since the Reformation, Irish Protestants who stood in the way of English greed were persecuted just the same as Catholics. None suffered more than the Presbyterians in the northern counties; none came to this country with a deeper hatred of British tyranny or fought more bravely to overthrow it here. Lastly, the whole system has been abandoned within this generation. All Englishmen now acknowledge that the claim once made, to force upon the Irish a religion which they did not believe, was a great, monstrous, bloody lie. Why should we not take them at their word?

But what concern have we in this contest? Why should we be disturbed by wrongs which we neither suffer nor inflict? I answer that, situated as we are, it is impossible to restrain our sympathies or school our feelings to the policy of a cold indifference. The Roman dramatist said, "I am a man, and therefore interested in all things human." These Irish are not merely human; they are not Tartars, Mongols, Indians, Chinese, or negroes—far off and doubtfully connected with humanity. They belong to our own imperial race, whose physical structure, mental endowments, and capacity for improvement, put them ever in the foremost rank of men. More than that—they are our kith and kin; we trace their ancestors in the line of our own descent; their blood, mingled with affluent streams from other sources, flows in our own veins. We are near to them in another sense—the steamer, the telegraph, and the newspaper keep us in constant communication. If a new outrage is at this moment breaking the dull uniformity of their misery, all America will know it before breakfast to-morrow morning. Moreover, we owe them a heavy debt, which we can not repudiate without dishonor. They fought by our side on every battle-field of the Revolution, and after Independence

they assisted to frame our institutions. At least five times since then their exiles settled among us have aided to save our liberty from destruction. They helped in 1800 to rescue us from the clutches of Federalism, which was tearing out the vitals of our government. Supported by them, we went through the blood and fire of 1812. They stood by Jackson in his desperate combat with a monster monopoly. At a later day and in another crisis, uniting with the honest Germans and the decent part of our native citizens, they gave us strength enough to repel the foulest assault that ruffianism and hypocrisy ever made upon religious freedom. They were foremost in the fight for the Union when assured that its object was simply to maintain the supremacy of the laws ; and they had no share in that perjurious treachery which subverted the Government instead of defending it. They were faithful to the Constitution when it had only seven friends in the Senate, and its avowed enemies were two to one in the lower house of Congress ; when the President was impeached for a feeble effort to support it, and the Supreme Court itself dodged and faltered and hesitated to decide that a free citizen could not be arrested without a warrant or hung without a trial. I speak of them as a body and of their general behavior. Doubtless there are many individual exceptions of which I know nothing. But fifty years ago and upward John Randolph said this : "I have seen a white crow, and heard of black swans, but an Irish opponent of American liberty I never either saw or heard of."

But what can we do for them ? How can we help them in this fearful strait ? We have no right to come between England and her subjects by any kind of force or violence, for that is prohibited by the law of both countries and by treaty stipulations. But you have ways, well understood, of giving moral comfort and material aid which break no law. The most devoted adherents of the British ministry acknowledge that the success of their Irish policy is more endangered by your opposition to it than by all other causes put together. A land league merely Irish they can easily repress, but a league with its roots on this side of the Atlantic will grow to be a power, not merely formidable but fatal to the ascendancy of the landlords. To make this more intelligible will require a brief look at the situation.

The formation of the Land League, or rather the assumption of its present attitude, was a new era in the history of the contest. Agricultural laborers resolved that they would not work for their enemies, and tenants said they would voluntarily pay no rent without distinct assurance of some permanent and substantial relief to the country. Acting upon the precept of the early Christians to bear one another's burdens, they solemnly covenanted that each should be supported by the strength of all the rest. It was the grandest labor-strike on record.



The association was perfectly lawful. No criminal design was ever imputed to it. Active assistance they would not render to their adversaries, but passive obedience to the law they would yield when they must. Nevertheless, it spread panic among landlords, middlemen, and bailiffs. They could not drive laborers to the field under the lash of an overseer, and they could not recover their rents by actions at law, for the tenant had a defense which no honest court could overrule. In a large majority of cases the contracts between the landlords and tenants were not free nor fair, but forced by the dread of eviction. Gladstone, the prime minister himself, declared that "eviction was the same as a sentence of death"; and certainly a bargain extorted by the terror of death carries with it no legal or moral obligation. It is wholly void, not as to the excess alone, but all through, so that there can be no recovery of any part. The landlords were in evil plight. They had thought the law was made only for them, and they were disconcerted when they found it invoked against them. The contest deepened as it grew more intense. Some of the landlords took new views of their duties; the league pressed its appeal to the heart and conscience of the British nation, and so a great revolution took place in public opinion. A new Parliament was elected, which included among its members the boldest and most eloquent leaders of the league; and a new ministry came in, solemnly pledged that Ireland should have justice without sale, denial, or delay.

The Parliament assembled, and it soon became evident that the ministry, instead of facing the great question of the day like men, were anxious only to shuffle out of their promises. Pushed by the Irish representatives, they threw themselves into the arms of the Tories, and the two parties exerted their joint ingenuity to contrive some excusable way of not doing it. They utterly failed. The land act of 1880 was a mere abortion. No attempt was made to sustain it; in less than a year it ceased to live, and was buried out of sight. Something had to be furnished in place of it. In spite of all warning, and against the steady protest of the wisest men, the land act of 1881 was elaborated and brought forth. Again all hopes were disappointed; the new act exasperated everybody, and made the antagonism between the parties more deadly than ever. For this there were good and sufficient reasons. The principal (at least the most taking) feature of that enactment was the privilege it gave to an Irish tenant of citing his landlord before a judge or commission, and getting an abatement of the accrued rent, if the tribunal in its caprice or its mercy should choose to pronounce it exorbitant. Landlords cried out upon this as an arbitrary interference with their vested rights, and tenants saw that it cut them off from showing that the claims were illegal. Both were right, for in every case where a reduction took place somebody must suffer: the landlord, if his contract was valid; the tenant, if



it was void. Besides, it created a power sure to be abused. The rights of the parties were not to be measured by any legal standard, and the unlimited discretion of the court was not to be controlled by a jury. Thus, matters affecting the most vital interests of every suitor were to be determined without the judgment of his peers, and with no regard for the law of the land. These are not the worst objections to the thing. It is wholly inadequate to the needs of the people. It does not sensibly or permanently lighten their burdens; it gives them no security against future wrongs; it concedes to them no natural right; it totally ignores the beneficent principle of local self-government, while it guards the power of the alien ruler with "love strong as death, and jealousy as cruel as the grave."

The ministry knew very well that this was no remedy for the chronic disease that was taking the life out of Ireland. Doubtless they thought it might serve as a palliative, or at least stop the screams of the patient for a time. But it failed to do even that. It was a quack plaster, which covered scarcely a perceptible part of the sore, and what it did touch was made worse by its poisonous irritation. The leaders of the people besought them not to swallow this stone, which they were offered in place of the bread they had asked for. They exhorted them to maintain their attitude of passive obedience and keep up the peaceful strike, until its object should be at least in some measure accomplished, which meant, "Without legal compulsion pay no rent, and do no work for these tyrants so long as they refuse to take their feet from off your necks." To the unanswerable wisdom and truth of this advice the Government had nothing to oppose except brute force. The league was called a conspiracy; its petition for justice was declared to be a revolt; its meetings were dispersed; the members of Parliament who had claimed fulfillment of the ministerial promises were arrested; five hundred leading men, distinguished as advocates of justice to Ireland, and guiltless as the child unborn of any other offense, were kidnapped, dragged from their homes, and thrust into prison.

For a long time Europe has seen no tyranny so atrocious as this. Within half a century Russian despotism has not practiced that kind of cruelty, even in Poland, on a scale so gigantic. The Turk has been on his good behavior ever since the Greek Revolution. It is more than a hundred years ago that the Bastiles of France used to be filled with the victims of personal and political spite. The English Government is more despotic than all the rest. It is a mixture of feudal barbarism and Oriental duplicity, harder to bear than mediæval tyranny. The hand of Gladstone is heavier on the heart of Ireland than the iron heel of Henry II. Do not forget that these sufferers are men of upright, honorable, and pure lives; they suffer *because* of their good character. No man liable to be condemned according to the law is ever smitten



against law. The worst rulers are content with the regular machinery of justice when they desire to suppress actual crime. It is only against the innocent that they employ the agency of the bravo and the kidnapper. The very order to seize these men, and keep them imprisoned without trial, is proof conclusive that they have done nothing worthy of death or bonds. They are accused of being *suspected* of *believing* that the land act of 1881 was not that kind of justice Ireland needed or had a right to expect. I say that is a great truth, and when you suspect a man of believing it you suspect only that he is virtuous and wise. When the Government arrests a man on that kind of suspicion and refuses him a trial, its officers give him the strongest certificate of good character they can make, and they confess themselves guilty of simple kidnapping.

Mr. Forster and others engaged in committing these outrages utter a shocking absurdity when they say that their object was to maintain law and preserve order. They commit crimes that strike Heaven in the face, and pretend to be doing it for the sake of the law that they violate. They break the faith that holds the moral world together, destroy all security for personal rights, establish a reign of terror, and they call that social order! Is not this a contradiction in terms and a mere mockery of common sense? I am able to maintain against all opposers that to seize an innocent man, put him in prison and hold him there, deprived of his liberty, is among the offenses against divine and human law which can not, under any circumstances, ever be justified. This is true when it is perpetrated by one private person upon another; but it is almost infinitely worse when done by a magistrate, whose sacred duty it is to prevent such wrongs, not to commit them himself.

For aught I can see, the kidnapping of five hundred innocent persons for not believing in the land act was as lawless as so many murders. The secretary and lord-lieutenant might just as properly have silenced opposition to their measures by private assassination. An order that dissatisfied Irishmen should be stabbed in their sleep or poisoned in their food would seem more ferocious, but not less inconsistent with justice or humanity. If Mr. Parnell and the league had managed to carry off Mr. Forster and five hundred of his ablest friends and kept them immured in dungeons for a period of hopeless end, the case could have been very plain but not worse than what Mr. Parnell has suffered, nor quite so bad, for the injury to him was inflicted by the very hand that was specially bound to protect him.

This charge of lawlessness is not answered by showing that the atrocities complained of were done with the approbation of Parliament. That body could not give to such crimes the sanctity of legal justice. I admit that Parliament is unlimited in its power to legislate, but an *ex parte* order to kill or imprison a man is not legislation.

The coercion act is not a law, but a sentence. As a doom pronounced upon innocent and absent parties without notice, hearing, or trial, it was of course irregular, unjust, and unauthorized ; but still it was, in its nature, an adjudication against particular persons, not a rule of action. When, therefore, the Viceroy and the Secretary for Ireland plead the coercion act, they do not justify their hideous crime, but only prove that a majority of the Lords and Commons are among their accomplices.

If Herod of Judea had got an order from the Sanhedrim or some legislative council directing him to kill every child in Bethlehem whom he or his deputies *suspected* of being less than two years old, would that have sanctified the "slaughter of the innocents"? In point of fact, he had the legislative approval, for he was himself the law-making power, as well as the executive. So was Charles IX, when he put the lives of Coligny and his friends at the mercy of the Guises, and so brought on the tragedy of St. Bartholomew's eve. Louis XIV could gratify the spies and pimps about his court by sending innocent men and women to rot in his Bastiles, and say : "This is the law ; the state does it ; I am the state." The Roman Senate did actually concur with Nero in the decree which let loose the prætorian guards upon all who were *suspected* of believing in the gospel ; but that takes nothing from the historical infamy of the emperor, though it does add much to the bad reputation of the conscript fathers.

In a court appointed, paid, and owned by the British Government and sitting in Ireland, this coercion act, which the ministry got a facile Parliament to pass, will probably be allowed to have some technical effect, but in the eye of reason and justice it is no extenuation at all of their gross misconduct.

Thus far I have spoken of the case as it stands between the British Government and its Irish subjects. Upon this we can only assist with our voices in making up the judgment of the world. But recent events have given us a more particular interest in the subject-matter. American citizens have been kidnapped as basely as the Irish patriots. What will we do about that? I know not. Our own history has not always been a proud one, our diplomatic record is not free from blunders ; and the *argumentum ad hominem*, while it proves nothing, may embarrass discussion. But if we submit to this insult, we must acknowledge that England is the master of Ireland and America both. If, on the other hand, we call that lawless power to a proper reckoning, she will see the necessity not only of discharging the American prisoners, but of making full and ample reparation, lest a worse thing come upon her. The release of the Irish will necessarily follow, for England can not afford to admit that she has yielded to fear what she denies to justice. This will advance the interests of freemen more than anything that has happened since Wellington and Peel knocked



under to the demand for Catholic emancipation. But the present ministry may not be as wise as their predecessors. They may resist our demand and bring on a breach of the extremely pleasant relations now existing between the two governments. What then? I venture no prediction, but I do know that every true-hearted man in America will be glad of the chance to quarrel for a cause like that.

I make no argument on the case. There is no open question about it. International law defines with perfect clearness how a citizen of one country may and must be treated when sojourning within the territorial jurisdiction of another. If that were not enough, we have treaties of amity, peace, and commerce with Great Britain which admit of no doubtful interpretation. Let no man fool you into the belief that England can lawfully kidnap an American without being responsible for the injury. Listen to no scurvy politician who tells you that there is any difference in this respect between a native and a naturalized citizen. There is no difference—not a particle. One has precisely the same right as the other to go forth unmolested over every sea and every land. So says our own law; so says the public law of Christendom.

What is to be the final outcome of the struggle? It needs no prophet to foresee that Ireland is doomed to total destruction if she be not supported and sustained by strength outside of her own. But if we, the American people, shall perform our duties fairly well, and if our Government shall not attempt to shirk out of its public responsibilities, the hope is a reasonable one that some of us now here may live to see Ireland "redeemed, regenerated, and disenthralled."

It seems to me that the friends of Ireland, at home as well as here, have very indefinite ideas of the ultimate purpose they are seeking to attain. Of course, they all desire to save their country. But what is salvation? In what form or by what means is it expected to come? How would they go about to restrain misrule, protect life, secure liberty, and prevent labor from being robbed of the bread it earns? These are questions upon which there is a painful diversity of opinion, and, if I am not mistaken, a vagueness of thought which greatly weakens the movement.

I will not presume to advise them, but it is manifest that they should demand nothing extravagant or unreasonable; nothing which it is impossible to get; nothing unjust, communistic, or agrarian; nothing which could affect injuriously the rights of property; nothing, in short, except what ought to be yielded. What, then, should they specify as their defined object?

Not independence. That is impossible at this time; you might as well reach for the moon, and hope to pull it down. Those two islands can not now be politically separated. If a total political separation from England were possible, it ought to be accomplished and doubtless

it would have been long ago, for the Irish have suffered wrongs a thousand times greater than those for which we rebelled against that same power. If Ireland could successfully rise up against that bloody, tyrannical Government, "throw off the shackles of usurped control and hew them link from link," every honest American heart would swell with pleasure to witness it. But we are obliged to think of something less desperate. We can not, at least for the present, advise them to go out on a forlorn hope.

But local self-government is another thing. It is the interest of England, as well as her duty, to grant that. If the Irish people were in full possession of the right to administer their own domestic affairs, they could perform their duties to the empire a thousand times better than now. They would be the pride and the strength of England; not what they are—the weakness, the misfortune, and the shame. When we consider how easily, cheaply, and safely this unspeakable benefit might be bestowed, it is literally amazing to see it withheld. It is but erecting one or more political corporations, which you may call states, or territories, or provinces, to make, administer, and execute laws upon subjects which concern nobody but themselves, and with such limitations upon the power as may seem necessary to prevent its possible abuse. If this, coupled with a satisfactory adjustment of land tenures, would not start Ireland on a career of peace and prosperity, then all history is false, all experience delusive, and all philosophy a woven tissue of lies. Yet the average Englishman can not hear of home-rule for Ireland without becoming infuriated, and, if he happens to be clothed with a little brief authority, he falls to killing and kidnapping right and left whenever he can find men with spirit and principle enough to express opinions in its favor. This insane animosity can not last much longer. But political freedom can scarcely exist for a people subjected to the personal bondage of the Irish landlord system. Can that be abolished without violating honor and justice, or breaking over the legal defenses of property? Let us see what can or can not be done in that direction.

It is a mere truism to say that the land belongs to the owners. The title is in the landlords, and can not be questioned with any decent show of truth. To take it from them and give it to the tenants would be naked robbery, not in the least mitigated by the consideration that the tenants need it and the landlords can live without it. The eighth commandment is addressed alike to the poor and the rich. An objection similar in principle lies against any arrangement for fixing the rent by a public assessor or for reducing it without the consent of the landlord. That is the fatal vice—fatal, because it is a moral error which runs through the land act of last year. Ownership implies complete dominion. A man is not the owner of property if he can not keep it, or lease it, or sell it as he pleases. It would be



as righteous to take the land itself as the rent. It has been proposed that the landlords should sell and the tenants buy the lands at prices mutually agreed on, which is rather ludicrous, considering the situation of the parties. The present land act points in a weak way to the policy of encouraging this by government aid. But as a general plan it can never succeed. The landlords will never part with the property unless they get three times as much as it is worth, for they count in as part of its value the power they now have of making the tenants work it for nothing. They want to sell the land which they do own, and with it the slaves which they do *not* own, at the highest price they can put upon both.

But this huge mountain of sorrow may be removed easily, cheaply, and in a way open to no legal or moral objection. Every established state—every supreme government of whatever form—has the right of *eminent domain*—that is to say, the power to take private property for public use upon making just compensation. It is a distinct and well-understood condition of all titles that they shall be surrendered upon those terms when the general good requires it. The sovereign authority may thus annihilate any monopoly which can not exist, or is not likely to exist, without serious detriment to the public interests. The property of the Irish landlords comes directly within the range of this power. The exercise of it would not be agrarianism, nor confiscation, nor plunder. It could not injuriously affect the rights of any human being, but it would reach the one great end at which all honest government is aimed—the well-being of the whole community.

I have said that the owners of property so taken are always entitled to just compensation. The Irish landlords should have that and nothing more. The rule for ascertaining what ought to be paid in any case is so plain that no fair-minded man could miss it. The actual value of land is not measured by the rent which a landlord could extort from a helpless tenant, to whom eviction is death; but what a prudent and industrious man who cultivates it himself could make out of it over and above necessary expenses and full payment for his own labor. The taking would not include any property actually used by the landlords themselves for their own pleasure or profit, nor any lands leased for other than agricultural purposes. But the body of the land now under cultivation or in pasture being taken by the public authorities could be distributed among the people in suitable pieces, and held by them subject to a tax large enough to pay interest on the actual value. Upon those terms, easy to the tenant and just to the landlord, Ireland would be converted into a nation of small proprietors, independent and free.

Our fathers in Pennsylvania encountered exactly the same trouble. They grappled with it like true men, and, rightfully exercising the power of eminent domain, they put an end to it speedily. In 1779 the

Penn family owned probably more than four fifths of her territory. The best citizens, dreading the fate of the Irish, were beginning to emigrate. The Legislature declared that such a condition of things was inconsistent with the happiness, safety, and freedom of the Commonwealth. They divested the title of the Penns, and provided that in place of the lands they should take a certain just compensation in money. Let the British take the Pennsylvania case as a precedent. On a question of fundamental law or national justice they could not have higher authority than the steady Quakers, the high-principled Germans, and the free-hearted Scotch-Irish who honored that State by making it their home. If the beneficial consequence be doubted, look at France, where the peasantry were oppressed and degraded by landlords as much as the Irish. But one result of the great Revolution was to divide the lands among small proprietors, and now the working-men in the several departments are all rich—forty-nine out of every fifty increase their fortunes annually.

I make no appeal to your sympathies or feelings. Your benevolence may sleep if the naked statement of the case does not rouse it. But pardon me if I conclude with a suggestion which touches your material interest. In all countries and in every age some persons have sought not only to live, but to flourish and fatten, upon the industries of others. Various methods of effecting their objects have been introduced, by force or fraud and carried on under legal regulation. In feudal times the plan of those who held power was uniform and simple; it consisted merely in extorting rents from the cultivators of the soil and taxes from those who worked at the mechanic arts. In modern days other inventions for the same purpose have been sought after and found out. Land and labor are the sources of all wealth, now as much as ever, and the legalized schemes are innumerable for draining it away from those who create it. Some of these devices have been brought to as much perfection in this country as in any other. Here, as elsewhere, unjust legislation and cunning arrangements of business grind the working-man to swell the colossal fortunes of the upstart adventurer. Here, as elsewhere, the hastening evil is upon us of a community "where wealth accumulates and men decay." The struggle to be free, which land and labor are making in Ireland, is not exclusively an Irish affair. We make it a common cause, not merely because the love of justice and the sense of right impel us, but because this is a united effort to deliver ourselves as well as them from the hand of the spoiler. If we assist Ireland to win the victory she hoped for, we expand our own principles, perfect our own practice, and strengthen our own courage for a contest, perhaps more arduous, which we may have to wage on our own account.



## RAILROAD MONOPOLY.—ARGUMENT TO THE JUDICIARY COMMITTEE OF THE SENATE OF PENNSYLVANIA.

MR. CHAIRMAN: The irrepressible conflict between the rights of the people and the interest of the railroad corporations does not seem likely to terminate immediately. I beg your permission to put our case on your record somewhat more distinctly than heretofore.

Why do I give myself this trouble? My great and good friend, the President of the Reading Railroad Company, expresses the suspicion that I am quietly acting in the interest of some anonymous corporation. I wish to contradict that as flatly as I can.

The charge that I am communist enough to wish the destruction of all corporate property is equally untrue. I think myself the most conservative of citizens. I believe with my whole heart in the rights of life, liberty, and property, and if anybody has struggled more faithfully, through good report and evil, to maintain them inviolate, I do not know who he is. I respect the State Constitution; perhaps I am prejudiced in favor of natural justice and equality. I am convinced that without the enforcement of the fundamental law honest government can not be expected.

These considerations, together with requests of many friends, should be sufficient reason for doing all the little I can to get "appropriate legislation." At all events, it is unfair to charge me with any motive of lucre or malice.

It is not proposed by those who think as I do that any corporation shall lose one atom of its property. A lawful contract between a railroad company and the State is inviolable, and must not be touched by hostile hands, however bad the bargain may have been for the people. Mr. Gowen, and all others with similar contracts in their hands, are entitled each to his pound of flesh, and, if it be "so nominated in the bond," the Commonwealth must bare her bosom to all their knives and let them "cut nearest the heart."

But we, the people, have rights of property as well as the corporations, and ours are—or at least they ought to be—as sacred as theirs. Between the great domain which we have conceded to them, and that which still belongs to us, the line is plainly and distinctly marked, and if they cross it for purposes of plunder they should be driven back under the lash of the law. It is not the intent of the amended Constitution, nor the desire of those who demand its enforcement, to do them the slightest injury. We only ask for that impartial and just protection which the State, as *parens patriæ*, owes to us not less than to them.

In the first place, it will, I think, be admitted by all impartial persons of average intelligence, that the companies are not the owners /

of the railroads. The notion that they are is as silly as it is pernicious. It is the duty of every commercial, manufacturing, or agricultural state to open thoroughfares of trade and travel through her territory. For that purpose she may take the property of citizens and pay for the work out of her treasury. When it is done, she may make it free to all comers, or she may reimburse the cost by levying a special tax upon those who use it; or she may get the road built and opened by a corporation or an individual, and pay for it by permitting the builder to collect tolls or taxes from those who carry and travel on it. Pennsylvania has tried all these methods with her turnpikes, canals, and railroads. Some have been made at her own cost and thrown open; on others, made by herself, she placed officers to collect a special tax; others have been built for her by contract, in which some natural or artificial person agreed to do the work for the privilege of appropriating the taxes which she authorized to be levied.

But in all these cases the proprietary right remained in the State, and was held by her in trust for the use of the people.

Those who run the railroads and canals are always public agents. It is impossible to look at them in any other light, or to conceive how a different relation could exist; because a railroad, which is not managed by public agents, can not be a public highway. The character of these agents and the mode of their appointment, even upon the same work, have differed materially. The Columbia Railroad, and all the canals, were for a time under the management of officers appointed by the Governor, or elected by the people, and paid out of the State Treasury. Afterward the duty was devolved by the State upon persons associated together under acts of incorporation who contracted to perform it upon certain terms. The Erie and Northeast Railroad was at first run for the State by a company; the company was removed from its trust for misbehavior; the Governor then took it and appointed an officer to superintend the work; later the Governor's appointee was displaced, with the consent of the Legislature, and the duty was again confided to a corporation newly chartered.

None of these agents—neither the canal commissioners nor the State Receiver, nor any corporation that went before or came after—had the slightest proprietary right or title to the railroads themselves. To say that they had would be as preposterous as to assert that township roads are the private property of the supervisors.

The legal relations existing between the State and the persons whom she authorizes to supervise her highways was somewhat elaborately discussed by the Supreme Court of Pennsylvania in the case of the Erie and N. E. R. R. Co. *vs.* Casey (2 Casey, pp. 307-324). It was there determined that a railroad built by authority of the State for the general purposes of commerce is a public highway, and in no sense private property—that a corporation authorized to run it is a



servant of the State as much as an officer legally appointed to do any other public duty, as strictly confined by the laws, and as liable to be removed for transgressing them.

All the judges concurred in this opinion. The two who dissented from the judgment did so on the technical ground that certain circumstances, which would have estopped the State in a judicial proceeding, disarmed the Legislature of the power to repeal. Neither they nor any other judge in this country, whose authority is worth a straw, ever denied the doctrine for which I have here cited that case, though it may have been sometimes overlooked, ignored, or perchance evaded. This principle and no other was the basis of the decision in Pennsylvania and all the other States, that cities and counties might issue bonds or their money and tax their people to aid in building railways. The Supreme Court of the United States has affirmed it in scores of cases. It was so universally acknowledged that the Convention of 1873 incorporated it into the Constitution as a part of the fundamental law. I do not know upon what foundation more solid than this any great principle of jurisprudence was ever established in a free country. When, in addition, you consider the reason of the thing, and the supreme necessity of it for the purposes of common justice, it seems like a sin and a shame and a scandal to oppose it.

It being settled that the railroads and canals belong of right to the State for the use of the people, and that the corporations who have them in charge are mere agents to run them for the owners, it will surely not be denied that all proper regulations should be made to prevent those agents from betraying their trust. The wisdom is very plain of those provisions in our Constitution which put them on a level with other public servants, and forbid them to prostitute their functions to purposes merely mercenary, or to engage in any business which necessarily brings their private interests into conflict with their public duty. Seeing the vast magnitude of the affairs intrusted to them, and the terrible temptation to which their cupidity is exposed, it is certainly necessary that you hold them to their responsibilities, and hold them hard.

But, on the other hand, the corporations deny that they owe any responsibility to the State, more than individuals engaged in private business. They assert that the management of the railroads being a mere speculation of their own, these thoroughfares of trade and travel must be run for their interest without regard to public right. If they take advantage of their power to oppress the labor and overtax the land of the State; if they crush the industry of one man or place to build up the prosperity of another; if they plunder the rich by extortion, or deepen the distress of the poor by discriminating against them, they justify themselves by showing that all this was in the way of business; that their interest required them to do it; that if they had

done otherwise their fortunes would not have been so great as they are; that it was the prudent, proper, and successful method of managing their own affairs. This is their universal answer to all complaints. Their protests against legislative intervention to protect the public always take this shape, with more or less distinctness of outline. In whatever language they clothe their argument, it is the same in substance as that with which Demetrius, the silversmith, defended the sanctity of the temple for which he made shrines, "Sirs, ye know that by this craft we have our wealth."

That railroad corporators and their paid adherents should take this view of the subject is perhaps not very surprising. Nor does it excite our special wonder to see them supported by the subsidiary rings whom they patronize. But, it is amazing to find that this odious and demoralizing theory has made a strong lodgment in the minds of disinterested, upright, and high-placed men. Two members of the Senate Judiciary Committee—I do not say the ablest, because comparisons are odious—but they are both of them among the foremost men of the country for talents and integrity—these gentlemen emphatically dissented from me when I asserted that the management of the railroads was not a matter of business to be conducted like a private enterprise, merely for the profit of the directors or stockholders. A heresy so supported is entitled to serious refutation, however absurd it may seem on its face.

I aver that a man or a corporation appointed to do a public duty must perform it with an eye single to the public interest. If he perverts his authority to purposes of private gain he is guilty of corruption, and all who aid and abet him are his accomplices in crime. He defiles himself if he mingles his own business with that intrusted to him by the government, and uses one to promote the other. If a judge excuses himself for a false decision by saying that he sold his judgment for the highest price he could get, you cover his character with infamy. A ministerial officer, like a sheriff, for instance, who extorts from a defendant, or even from a convict in his custody, what the law does not allow him to collect, and puts the surplus in his pocket, is a knave upon whom you have no mercy. You send county commissioners to the penitentiary for consulting their own financial advantage to the injury of the general weal. When the officers of a city corporation make a business of running it to enrich themselves at the expense of the public, you can see at a glance that they are the basest of criminals. Why, then, can you not see that the officers of a railway corporation are equally guilty when they pervert the authority with which they are clothed to purposes purely selfish? A railroad corporation is a part of the civil government as much as a city corporation. The officers of the former as much as the latter are agents and trustees of the public, and the public has an interest precisely similar in the



fidelity of both. Why, then, should partiality or extortion be condemned as criminal in one if it be tolerated as fair business when practiced by the other? Yet there are virtuous and disinterested statesmen among us who think that faithful service ought not to be enforced against the railroad companies, however loudly it may be claimed by the body of the people as their just due, and no matter how distinctly it may be commanded by the Constitution itself.

I am able to maintain that all the corruption and misgovernment with which the earth is cursed, grows out of this fatal proclivity of public servants to make a business of their duty. Recall the worst cases that have occurred in our history, and see if every one of them does not finally resolve itself into that. Tweed and his associates in New York; the Philadelphia rings; the carpet-bag thieves; the Star Route conspirators—all went into business for themselves while pretending to be engaged in the public service. Oakes Ames distributed the stock of the *Crédit Mobilier* where he thought it would do the most good to himself and others with whom he was connected, and that was business in him who gave and in them that took his bribes. Madison Wells, when he proposed to Mr. Kenner that he would make a true return of the election if he could be assured of getting “two hundred thousand dollars apiece for himself and Jim Anderson, and a less sum for the niggers,” had as keen an eye to business as if he had been president of a railroad company, instead of a returning board. Certain greedy adventurers made it a business to rob the nation of its lands, and uniting with Congress carried it on so magnificently that they got away with an area nearly equal to nine States as large as Pennsylvania. The imposition of the whisky-tax, excluding what was held on speculation, was business to the officers and legislators who were sharp enough to anticipate their own votes. You will see on reflection that every base combination which officers have made with one another, or with outside parties, has been a business arrangement, precisely like that which the railroads justify on the sole ground that it *is* business. The effect is not only to corrupt those who engage in such transactions, but to demoralize all who are tempted by personal and party attachments to apologize for it.

When the officers of the Pennsylvania Railroad Company corruptly bought the remission of the tonnage tax, and thereby transferred to their own pockets an incalculable sum justly due to the State, it was business, rich to them and profitable beyond the dreams of avarice, while to the swindled tax-payers it was proportionably disastrous. The nine million steal of later date was a business enterprise which failed because Governor Geary most unexpectedly put his veto upon it. Still more recently the same corporation undertook to get from the Treasury of the State four millions of dollars to which it had no decent pretense of a claim. Never was any affair conducted in a more



perfectly business-like way. The appointed agents of the corporation came to Harrisburg when the Legislature was in session, and regularly set up a shop for the purchase of members at prearranged and specified prices. You condemn this piece of business because it was dishonest, but was it more dishonest than that which the same corporation habitually does when it stands on the highway, and by fraud or force extorts from individual citizens a much larger sum in excessive tolls to which its right is no better than to the money it tried to get by bribery?

The functions of railroad corporations are as clearly defined and ought to be as universally understood as those of any servant which the State or General Government employs. Without proprietary right in the highways they are appointed to superintend them for the owners. They are charged with the duty of seeing that every needed facility for the use of those thoroughfares shall be furnished to all citizens, like the justice promised in *Magna Charta*, without sale, denial, or delay. Such services, if faithfully performed, are important and valuable, and the compensation ought to be a full equivalent; accordingly, they are authorized to pay themselves by levying upon all who use the road a tax or toll or freight sufficient for that purpose.

But this tax must be reasonable, fixed, certain, and uniform, otherwise it is a fraud upon the people which no department of the State government, nor all of them combined, has power to legalize.

It is much easier to see the nature and character of the mischief wrought by the present practices of the railroad companies than it is to calculate its extent. If your action depends in any degree upon the amount of the spoliation which the people of the State have suffered, and are now suffering, for want of just laws to protect them, you certainly ought to direct an official inquiry into the subject and ascertain the whole truth as nearly as possible.

But investigations have already taken place in Congress and the Legislatures of several States; complaints founded upon specified facts come up from every quarter; verified accusations are made by some of the companies against others; railroad men have openly confessed their fraudulent practices, and sometimes boasted of the large sums they accumulate by them. Putting these together, you can form at least an approximate calculation. I doubt not you will find the sum total of the plunder they have taken in the shape of excessive charges to be frightful.

Three or four years ago a committee of the United States Senate collected the materials, and made a report upon this general subject, in which they showed that an excess of five cents per hundred-weight charged on the whole agricultural crop of the then current year, would amount to seventy million dollars. Upon the crop of the last year it would doubtless come nearer a hundred millions. The railroads would not get this sum, because not near all of it is carried, but it



would operate as an export tax operates ; that is to say, the producer, the consumer, or the intermediate dealer, would lose that amount on the whole crop, carried or not carried. In 1880 the charges from Chicago to the Eastern markets were raised from ten cents per hundred-weight to thirty-five cents, the latter rate being unquestionably twice as high as a fair one. You can count from these data the terrible loss sustained by the land, labor, and trade of the country. It was the end and the attainment of a combination still subsisting between the great trunk lines, as they are called, to pool their receipts, to stop all competition, to unite the stealing power of all into one grand monopoly, and put the whole people at their mercy. It was a criminal conspiracy by the common and statute law of all the States.

The magnitude of these excessive charges is not the worst thing about them. The corporations think it perfectly right to raise or lower the freight as they please without regard to the rights or interest of anybody but themselves. A grain-grower, manufacturer, miner, or merchant, who can sell his goods at a profit, if he can get them carried at the rates of to-day, may find himself ruined to-morrow by an increase which did not enter into his calculations. A rise in the market inures not to the benefit of the producer, but to the use of the carrying corporations, which openly avow that their rule is to charge in all cases as much "as the traffic will bear" ; that is to say, as much as the shipper can submit to without being driven entirely off the road. You must see plainly that this power to depress agriculture, to diminish the profits of manufacturing industry, and to skin the commerce of the whole country by the arbitrary use of a sliding scale upon freights, can not safely be trusted to human hands, and especially not to irresponsible corporations whose interest, as well as their acknowledged principle of action, constantly impel them to abuse it. Can it be that a Pennsylvania Legislature will hesitate to curb the career of this destructive monopoly by adjusting the charges according to some rule equitable, fixed, and certain ?

But even this sinks into insignificance compared with the wrong and evil of their discriminations. Common justice, sound policy, every sense of duty, the whole spirit and letter of the law, require them to give every man equal facilities in the use of the roads, and to charge them at the same rates for the same class of goods, according to weight and distance. There can be no possible doubt about this. Every unprejudiced man, who has sense enough to know his right hand from his left, acknowledges that equality must be the rule of right ; and he understands this perfectly well without looking at the Constitution, where it is solemnly declared to be part of the *lex legum*, the law of laws, and the rule of all rules on the subject. Yet this sacred principle is constantly and steadily violated, trampled under foot, and treated with heartless contempt.

At the slightest glance you will see the enormous injury, direct and consequential, which these discriminations inflict upon the public. A man who invests his capital, or employs his time in mining or manufacturing, can be driven into bankruptcy at any time by a discrimination against him, and in favor of his competitors. This is done every day, and all the time, not in a few cases here and there, but systematically and regularly, whenever a carrying monopoly conceives that its own interests can be promoted in that nefarious way; and it will continue to be done until the prohibition of the Constitution is enforced by penal enactment.

Instead of breaking the foul bulk of these enormities, I will give you a sample—convenient, because it is small and easily handled. A neighbor and friend of mine (in partnership with another) became the lessee and operator of a coal-mine in Northumberland. For a short distance they were obliged to carry their product over one of the branches of the Pennsylvania Company; they were charged for the use of the road and motive-power alone—there was no loading or unloading in the case, and no cars were furnished by the company—at about the rate of twenty cents per ton per mile; while others whom the monopoly chose to favor were let off at two cents. They paid the excess under protest, and brought suit to recover it back. It was as simple a case of extortion as can be conceived; but certain officers of the Pennsylvania Railroad Company swore that in their judgment it was right to commit it, and, moreover, declared that it was a usual, common, and customary practice. I blush to acknowledge that in all this the Supreme Court indorsed and abetted the corporation. The dialectics of the decision turned on a *prohibition* in the charter *against* charging more *on an average* than four cents per ton per mile—which was construed as a legal *warrant* for any robbery of one person which the company could prove to be balanced by the aggregate of favors shown to all others. But neither the greatest corporation in the State, nor the highest judicial tribunal, paid any respect whatever to the principle that all men's rights to the use of the public highway are equal.

It is known and not denied that this equality of right (sacred and fundamental though it be) is by the common practice of carrying companies corruptly disregarded.

If you want to drive business competition out of the field, bribe a railroad manager to raise the freights upon your rivals and lower your own, or take the whole board of directors into partnership with you, or promise to divide the spoils with the corporation, and they will make you a monopoly with power to plunder, limited only by the range of your dealings. The loss thus inflicted upon the worthiest men in the land is startlingly large. By a single one of these arrangements—that with the Standard Oil Company—the estimated injury,



direct and consequential, to honest persons within the State, amounts to not less than a hundred and fifty million dollars. For this fact you have the statement of Mr. Gowen, whose veracity no man that knows him will doubt, and whose faculties of observation, sharpened by a personal interest in the subject, make him a most intelligent witness.

At whatever place one of these railroad corporations has power to control the whole carrying-trade, or where several combine together for that purpose, they victimize the people remorselessly. I give you the example of York for the reason that it presses itself on my own attention with peculiar force. The freight exacted on the single article of anthracite coal is nearly one dollar per ton more than is charged upon the same commodity carried from the same mine and delivered by the same company at Baltimore. In all reason and conscience it should be from fifty cents to a dollar less, seeing that the distance is sixty miles greater to Baltimore. That makes the discrimination against York at least equal to a dollar and a half on every ton. The quantity consumed in the latter place is something upward of a hundred thousand tons; and the excessive tax upon it all is therefore one hundred and fifty thousand dollars. Every cent of this is as wrongfully taken as if it were feloniously stolen. It amounts to many times as much in the aggregate as all the legitimate taxes which the same community pay for the support of the State, county, schools, and almshouses. Nay, it is more than all the taxes imposed for those purposes on the whole of the great county in which the town of York is situated. A manufacturer there who uses two thousand tons of coal per annum must pay three thousand dollars of black-mail to the railroads, or to the monopoly which they have created, unless the influence of his wealth gets it remitted. But the largest part of it is levied upon poor laborers whose wages are barely sufficient to furnish their families, in scanty measure, with food, shelter, and clothing; much of it is paid by the contributions of charity for those who would otherwise perish by cold and hunger. The man who can hear the simple story of this wrong without indignation must be as cold-blooded as a snake.

You need not confine your sympathies to York. I can give you no exact account of the similar suffering inflicted on Philadelphia. But any officer of the Reading Company can furnish it. Mr. Gowen, free spoken as he is about the sins of his rivals, is naturally reticent concerning his own. But if he opens his mouth he will tell you the truth; and, unless I am much mistaken, it will be an awful tale of wrong and oppression.

A full inquiry, if it shall ever be instituted, will probably show that nearly all the railroad corporations—the smaller ones following the example of the greater—have violated their charters by engaging “in mining and manufacturing articles for transportation over their

own works," and thus acquired a monopoly of the production as well as the carrying. It is in this way that the Reading Company has got the coal-market of Philadelphia under its foot. Why should not that corporation and the others be made to respect the majesty of justice by an enforcement of the Constitution (Section 5, Article XVII), which, if it leaves them what they have already got in violation of law, will at least prevent or punish such outrages in the future?

The imperious necessity, however, of enforcing the Constitution arises out of the depredations which they commit upon all classes everywhere within the State, in what they call their local rates. You can take the figures known to be true and demonstrate by the plainest process of simple arithmetic that their tariff of rates for carrying goods from place to place within the State is extortionate beyond all reason.

They have not the face to deny that their through rates are high enough to give them all the compensation they can reasonably demand for that part of their service. The trunk lines struggled and fought for that trade against one another with a fierceness which showed that they regarded it as very profitable. Their own competition reduced it for a while, but they combined and raised their charges high enough to satisfy all of them. It is ridiculous to say that this mutual agreement fixed the rates below a fair standard. That is a sort of error which monopolists never commit. Accepting the almost unanimous testimony of disinterested persons who ought to know whereof they affirm, the belief is fully authorized that they have fixed their through rates unreasonably high; but we will assume that they are only fair. That point being satisfactorily established, it follows, as the day follows the night, that the much higher rates which they charge on local freights are unjust and extortionate, a palpable violation of our rights, a gross offense against the Constitution.

I use the word *rate* in the popular and legal sense, as meaning the ratio or proportion of the whole charge to the distance the freight is carried. Thus, if a ton be carried six hundred miles from Chicago to Philadelphia for five dollars, and the same charge be made for carrying it twelve miles from Philadelphia to Media, the *rate* in the latter case is fifty times as high as in the former. I am credibly informed that such disproportioned charges are or have recently been made, and that as a general rule all local freights, whether the haul be long or short, are charged, without regard to distance, the same, or nearly the same, that would be charged on the same weight if carried from Chicago to Boston. To the extent of this enormous discrimination against our own people they are robbed and plundered.

The effect of it upon the agricultural interest can not be ascertained exactly without an investigation, which you can make, and I can not; but the reasonable probability is that it takes most unjustly from seven



to ten cents per bushel from the price of all grain grown in the State, and correspondingly reduces the value of all other products.

Then look how it touches the rights and interests of consumers in the great centers of population. Within a circle of one hundred and fifty miles in diameter around Philadelphia, provisions enough might be raised to feed the city; but they can not be taken there without paying a freight on them as heavy as it would cost to bring them from Illinois or Wisconsin. Thus an army of a million souls, some of them half mad with hunger, virtually have their base of supplies moved back six or seven hundred miles away.

These railroad men have another way of cheating the public; not for the benefit of their corporate treasuries, but to swell the private fortunes of the managers. A ring of them is formed into a separate transportation company, with the privilege of carrying on their own roads at the highest freights they can extort. By means of preferences and discriminations, the parent corporation forces into the hands of its bastard offspring as much of the business as it wants; for the shipper who refuses to patronize the ring must suffer the penalty of still higher rates as well as delay and difficulty. The Convention of 1873 believed that this was one of the devices for fleecing the trade of the Commonwealth which ought to be broken up, and the people adopted that opinion. Do you wish to continue it? If not, why do you hesitate to carry out the constitutional prohibition?

Perhaps the most remarkable, certainly the boldest thing about the discriminations we complain of, is that they are always avowedly made against those who are least able to endure the wrong. A heavy grain-dealer in the West, who ships his millions, may get rates ninety per cent below those extorted from a Pennsylvania farmer, with only a thousand bushels to carry. Between all rivals of unequal fortune, the railway king is ever strong upon the stronger side, and never fails to make his discrimination against the weaker concern whose business is conducted on the smaller scale. In my town of York the demand of some very rich manufacturers for lower rates has been conceded with gratifying promptness; but you might as well plead pity with a wolf as ask the monopoly to relieve a starving laborer by taking the excessive charges off his bread and fuel. Indeed, if the tariffs of railway charges be founded in any rule at all it is this: That all rates shall be high in inverse proportion to the magnitude of the cargo and the distance it is carried; the practical effect of which is to grind the face of the small trader that the great one may increase in fatness.

The only argument they make against the equality of rates commanded in the Constitution is that they can not afford it; that they must charge higher for short hauls and light loads, or else their compensation will be less than for the greater service. If this were true, it would be no ground of justification. But, in point of fact, it is

wholly untrue. It is not more difficult or costly to carry a hundred tons for fifty shippers than it would be to carry the same goods for one. The expenses incident to the reception and discharge of a cargo may be greater in proportion for short hauls than for long ones, but you can make that all even by allowing them to charge in addition to their mileage, for loading and unloading, whether the haul be short or long. These terminal expenses which they make so much ado about are nothing as an excuse for the enormous excesses of their local rates, and they know that very well. Their real reason is that they find it easier, safer, and more profitable to cheat a thousand poor men than one who is powerful enough to resist them, or rich enough to bribe them.

But they insist that they have a chartered right to do these things; that they have purchased from the State the privilege of charging unreasonable tolls, and making such discriminations as they think best for themselves without regard to justice; that the State has sold out to them the power of protecting the people against any wrong of that kind which they may choose to commit, and that the Constitution which forbids them is itself unconstitutional, because it impairs the obligation of a contract. Let us see whether there be or not any truth in this plea.

If the State had in express terms authorized them to impose unreasonable tolls or taxes upon the people for the use of their own roads, the grant would be void. Judge Baldwin's opinion to that effect in *Bonaparte vs. The Camden and Amboy Railroad Company* has never been denied or its soundness doubted from the day it was delivered to the present time. To give the corporation a power like that would be to give it the public highway as private property; to arm a body of mere adventurers with the police authority of the Commonwealth, and to convert railroad managers from public servants into public robbers. You might as well say that the Legislature could sell the State out and out.

Upon the same principle a grant of authority to discriminate between one citizen and another is worthless. The rights of all the people to be protected against robbery and extortion are precisely equal, and the Legislature can not barter away one more than the rest; that is to say, a wholesale bargain of that kind would be no worse than a contract to sell the rights of individual citizens at retail.

If, therefore, these companies had a bargain with the State, expressly giving them power to charge unreasonable or discriminating freights, it would be a mere nullity, and of course revocable at the will of the Legislature.

But no such contract was ever made between this State and any railroad company; at least, I never saw an act of incorporation upon which a decent pretense of that kind could be set up.



You must remember that in a public grant, whether of land, money, or franchises, nothing passes by construction; the grantee at the very utmost gets only what is given in express words of which the sense is too plain to be misunderstood—nothing goes by inference—no ambiguous phrase carries with it anything to swell the dimensions of the gift.

Now, where is the express grant of power to take more than a fair and reasonable toll for the use of any railroad? In what act of incorporation is it stipulated that the State may not adjust the tolls according to what she, by her proper authorities, shall deem a reasonable rule? The sole answer ever given to this is, that in some, if not all of the charters, there is a provision *forbidding* the company to make any charge beyond a certain rate per ton per mile, and from this prohibition against taking more they infer the right to take, in spite of the State, anything they please under that maximum, whether it be reasonable or not. But it is precisely such inferences that you can not make; they are excluded by the rule of interpretation already mentioned.

Neither does their practice of discrimination find the slightest countenance in any word of the charters. When did you ever see an act of incorporation expressly declaring that the company shall have power to make a difference between two citizens whose legal and natural rights to the use of the highway are precisely the same? Where do you find the words which clothe any company with the awful power to crush out the business of one man with burdens which he can not bear, in order that another, in which the railroad has an interest, may be built up? But especially and particularly I desire to know what part of any bargain with the State justifies the extortion of higher rates from a poor man, on his little freights, than from a rich one on his great and valuable cargoes? If you can not put your finger on the very words that give this authority, then the authority is withheld and the practice forbidden.

But that is not all. The limitation of the charges to rates, perfectly and uniformly proportioned to weight and distance, must be apparent to any one who will consider the nature of the contract, the subject-matter of it, and the parties to it. The Commonwealth, reserving the equal proprietary rights of all the people to the use of the highway, agrees to employ a corporation as her agent, to see that the exercise of the right by every citizen is properly facilitated, and never, in any case, impeded, delayed, or hindered. The agent agrees to do this service at rates which, in the aggregate, will be a reasonable compensation for *all* the labor and expense of it. As between the State, who is the *employer*, and the corporation, which is the *employé*, the contract is an entire one—a lump bargain—an agreement to do one whole job, which comprehends all the carrying for all the people on

that highway at a price for which the only measure furnished by the contract is weight and distance. Whenever, in those acts of incorporation, any mention is made of rates, taxes, or tolls, they are spoken of as proportioned to the use made of the road by him who pays them—so much per ton per mile, whether the miles be many or few, up grade or down, without regard to the number of tons carried at one time, or at different times, for the same shipper.

Let me illustrate a little further. If you make a contract to do a job of excavation at a price per cubic yard which gives you a heavy profit on the whole job, have you a legal right to demand additional pay for particular parts of it, which you allege to be harder than the rest? I do not say what claim you might have upon the liberality of your employer if the bargain, taken altogether, were a losing one; I only ask whether you could, by construction of the contract, charge more for one yard than another?

Take a case more precisely analogous. A contractor agrees to pave a mile of street at so much per foot, taxing the owners of the lots for the number of feet that front upon each one's property. Such contracts have been often made by the authorities of towns and cities, and they have never been understood to warrant a higher charge per foot against the owners of small and cheap lots than against the proprietors of those which are more valuable.

Reasoning fairly from premises known to be true, you can not escape the conclusion that the extravagant and discriminating charges of these corporations are a fraud upon their own charters, as well as a gross wrong to their victims. The contracts they invoke to save them from the justice of the State are as strong against them as the Constitution itself.

But there is a power of the State to control them, to check their rapacity, and to make them honest, which lies back of all this. The police authority, of which she can not disarm herself if she would, enables her to regulate the use, even of private property, in such manner that neither the general public nor particular individuals can be made to suffer by it unjustly. Upon that principle you can forbid an excessive rate of interest upon the loan of money, fix the charges of hack-drivers, or ferrymen, or tavern-keepers, or the owners of grain-elevators.

Besides all that, the State can abolish a monopoly, or bring it to terms of justice, at any time, by virtue of her right of eminent domain. All property, corporeal and incorporeal, is held upon condition that it may be divested whenever the general interest requires it. All charters and acts of incorporation are subject to such modification as may be necessary to prevent the owners from doing wrong to the public. This principle was expressed in the Constitution by the amendment of 1856; but that was not its origin: it existed from time immemorial



as a rule of public and universal law. It has always been one of the powers of every sovereign government, and it applies with equal force to all charters, whether dated before or after 1856.

These are arguments in favor of the power. Except in Pennsylvania, it would not be necessary to state them. Everywhere else the most zealous advocates of corporate monopoly concede the authority in question, while they deprecate its exercise. But here the shallow notion still lingers that an act of incorporation is an irrevocable license to defraud and plunder whomsoever the managers please to select as their prey.

I have hesitated to speak of free tickets. I can understand how a thing so cheap might be accepted as a mere courtesy, like a drink or a dinner. Perhaps, therefore, it is not *malum in se*. But since 1874 no man can hold office without taking an oath to obey the Constitution, which expressly prohibits free passes. Can that oath be violated with a safe conscience? I am a private citizen, and I speak with respect for the better judgment of others when I say that executive and judicial officers who have acted thus during the last ten years ought to be impeached and removed from their places. But that is easier said than done; for the House of Representatives, which should prefer the impeachment, and the Senate, which has exclusive jurisdiction to try it, are tarred nearly all over with the same stick.

The legal predicament in which this practice places the railroad officers is somewhat worse. The passes which they distribute are things of considerable value; worth, perhaps, two or three hundred dollars apiece, and hundreds of thousands altogether. If the agents of the company would bring up that much money in a bag, at the first meeting of every Legislature, and hand it around to the members, dishing out their shares to the judges and executive officers, it would look very much like wholesale bribery. But to bribe an officer it is not necessary that money should be used. Giving or offering "anything of value, testimonial, privilege, or personal advantage," is, by the Constitution and the statute, the same crime as giving silver dollars, gold eagles, or greenbacks. It must appear, however, that it was given to *influence* the officer or member of the General Assembly in the performance of his public or official duties. That is undoubtedly the very purpose and object of giving passes to members of the Legislature. I do not say or think that those Senators and Representatives who receive them consent to be so influenced. But that does not redeem the guilt of the giver, to whom it is impossible to ascribe any other intent than the criminal one. Those great corporate officers and their respectable subordinates, who are concerned directly and indirectly in these practices, are probably ignorant of the existing law. They ought to be solemnly warned by some penal enactment directly and exclusively aimed at this besetting sin.

We are often told that in this struggle for honest government against the power of the railroad corporations the just cause has no chance of success. We do seem to be out on a forlorn hope. The little finger of monopoly is thicker than the loins of the law.

The influence of our enemies over the Legislature is mysterious, incalculable, and strong enough to make the Constitution a dead letter in spite of oaths to obey it, and a popular demand, almost universal, to enforce it. There is no other subject upon which the press is so shy as upon this, the most important of all. Afraid to oppose the corrupt corporations, and ashamed to defend them, it sinks into silent neutrality. Prudent politicians always want a smooth road to run on, and the right path here is full of impediments. In this state of things we seem to be weaker than we really are; for the unbroken heart of the people is on the side of justice, equality, and truth. Monopolists may sneer at our blundering leadership and the unorganized condition of our common file, but they had better bethink them that, when the worst comes to the worst, our raw militia is numerous enough to overwhelm their regulars, well paid and well drilled as they are. They have destroyed the business of hundreds for one that they have favored. For every millionaire they have made ten thousand paupers, and the injured parties lack no gall to make oppression bitter.

The people, certainly, got one immense advantage over the carrying corporations when they adopted the seventeenth article of the Constitution. That concedes to us all the rights we ask, puts the flag of the Commonwealth into our hands, and consecrates our warfare. The malign influence that heretofore has palsied the legislative arm can not last forever. We will continue to elect representatives again and again, and every man shall swear upon the gospel of God that he will do us the full and perfect justice which the Constitution commands. At last we will rouse the "conscience of a majority, screw their courage to the sticking-place, and get the appropriate legislation" which we need so sorely.

Whenever a majority in both Houses become independent enough to throw off the chains which now bind them to the service of monopoly—when frequent repetitions of the oath to obey the Constitution shall impress its obligation upon their hearts—when admonition and reproof from within and without—"line upon line, precept upon precept, here a little and there a little," shall have taught them that fidelity to the rights of the people is a higher virtue than subserviency to the mere interests of a corrupt corporation—when the seventeenth article shall have been read and reread in their hearing often enough to make them understand the import of its plain and simple words—then, without further delay and with no more paltry excuses, they will give us legislation appropriate, just, and effective. A tolerably clear perception of their duty, coupled with a sincere desire to do it,



will enable them to catch the shortest and the easiest way. All trifling with the subject will cease at once; all modes of evading this great point will go out of fashion; no contrivance will be resorted to of ways not to do it while professing to be in favor of it; our common sense will not be insulted by the offer of a civil remedy to each individual for public offenses which affect the whole body of the people and diminish the security of all men's rights at once. The legislative vision, relieved from the moral *strabismus* which makes it crooked now, will see straight through the folly of trying to correct the general evil except by the one appropriate means of regular punishment at the suit of the State. Does this seem harsh? Certainly not more severe than any other criminal law on our statute-book which applies to railway managers as well as to everybody else. They need not suffer the penalty unless they commit the crime; and they will not commit the crime if you make a just penalty the legal consequence. Pass a proper law to-day, and they will be as honest as you are to-morrow. Every one of them can be trusted to keep clear of acts which may take him to the penitentiary. They have been guilty in their past lives, and will continue in evil-doing for some time to come, because the present state of your laws assures them that they shall "go unwhipped of justice." But threaten them with a moderate term of imprisonment and a reasonable fine, and they will no more rob a shipper on the railroad than they will pick your pocket at a prayer-meeting. Your law will do its work without a single prosecution. Thus you could, if you would, effect a perfect reform, and yet not hurt a hair on any head—"a consummation most devoutly to be wished."

But it is not to be expected that such good will come immediately. Nearly ten years ago the Legislature was commanded to carry out the beneficent measure of the Constitution. For nine years that illustrious body was a dumb impediment to the course of justice—all its faculties paralyzed by some inscrutable influence—dead—devoid of sense and motion, as if its only function was to "lie in cold abstraction and to rot." At last, when it was wakened up by the present Governor and reminded of the seventeenth article, it opened its mouth and spoke as one who did not know whether he was sworn to oppose the Constitution or to obey it. Some members have shown their utter hostility to it, some seem willing to defend small portions of it, and one Senator discovered that it was all equally sacred. But his plan meets no favor. Still, we need not despair. The people and the Constitution, mutually supporting one another, will be triumphant yet. Meanwhile let all the railroad rings rejoice. This is their day; ours is to come.

## EULOGIES.

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ON THE LIFE AND CHARACTER OF GENERAL ANDREW JACKSON, DELIVERED AT BEDFORD, PENNSYLVANIA, JULY 28, 1845.

FELLOW-CITIZENS : We have met to pay our tribute of respect and admiration to the memory of the man who has, for nearly fifty years, filled a large space in the public eye, and whose character, for the last thirty years, has been the almost constant subject of discussion by this whole nation. His friends constituted a very large majority of the people, and on their lips his name was the most familiar topic of applause. In their eyes he was mighty in word and in deed. If he addressed their understandings, they were convinced by what they deemed his unanswerable reasoning ; if he spoke to their hearts, their affections gushed forth in overflowing gratitude and veneration. In civil and in military life he was, alike and at all times, "the hero they loved and the chief they admired."

This devoted attachment was, however, not universal. A large minority, not only respectable by its numbers, but formidable by the talents, the moral influence, and the social dignity of its members, had a far different opinion of his character. By them his qualifications as a statesman were derided ; and, though his military services were not denied, his opponents were not always unwilling to depreciate the value even of *them*.

The discussion was bitter enough while it lasted—too bitter, perhaps, for the credit of those engaged in it. But death, if it has not closed the controversy, has at least softened the tone in which it is to be conducted. The king of terrors is merciful as well as severe. When he strikes a great man to the earth, he interposes between him and his enemies the most effective shield his character can have. Human nature recoils from an effort to disturb the ashes of the departed, and shrinks from any attempt to continue a war against the spirit which has already rendered its final account to the Great Judge. When the career of a public man is once closed forever, his opponents review



their old opinions with candor, the indifferent become interested, and hearts that were cold and hardened are moved, at last, to "the late remorse of love." Men whose position in society or whose relations to the public compelled them to be neutral in his lifetime, are released by his death from the obligation of silence, and may vindicate him if they will as freely as others.

But there is a measure of justice even for the dead. Truth is not less important, when the grave has closed over the person to whom it relates, than it was when he lived and moved among us. The majesty of death, though it awes partisan malignity into silence, commands the voice of history to speak and the world to listen to its truths; and no matter whether its judgment be favorable or adverse, the tribunal is too august to be trifled with, and its decrees must be submitted to.

In the case of the man upon whose character you, as a part of his countrymen, are now sitting in judgment, we ask nothing but patience and candor. We make no claim to your sympathies, on the mere ground of reverence for the dead. We are indeed most anxious that the good he has done should live after him, but we do not demand that the evil should be interred with his bones. In dealing with his memory there is no middle way. He himself was not a half-way man. If he was really unprincipled and bad, he was the very worst man his country ever produced—nay, he was almost a demon—and his memory should be clothed with infamy as with a garment. But if the opinions of his friends be correct, I know not the man on earth whose eloquence is strong enough to speak his eulogy—there can scarcely be a limit to the admiration which is due to him. The timid or the false friend, who would "damn him with faint praise," is only a *little* better than the enemy who would blacken him with defamation.

Taking as I do the better (and I trust the truer) view of his character, I can say, with the most perfect conviction of its truth, that ANDREW JACKSON is entitled to stand higher on the list of public benefactors than any other man of his time—that he was a soldier unrivaled for skill and intrepidity, a patriot pure and faithful, and a statesman uniting the greatest and best qualities of a republican ruler.

If these propositions be true, they ought to be proved—and when proved, they ought to be admitted by those who may now be disposed to deny them. It is time the vexed question were settled. The great cause of human liberty suffers by every moment of delay. If it be true that the man whom an immense majority of the American people believed to be honest and wise, was merely a headlong tyrant, ignorant, reckless, overbearing, and unprincipled, then is that people wholly incapable of self-government. If they not only gave up the helm of their republic into the hands of a most unworthy man,

but praised him when his insane ambition trampled on their rights, and afterward solemnly approved all his mad pranks, then they have neither the spirit nor the intelligence of freemen. In that case their consummate folly admits no prospect of a cure. The bubble of republicanism has burst; the experiment has failed; and our final hope for the cause of liberal principles must be converted into flat despair. In vindicating the name of Jackson, therefore, from whatever of misconstruction it may have suffered, we are serving the greatest and most elevated of all human purposes—the advancement of civil and religious liberty. Every one should be rejoiced to see such a man take his true position in the history of his country; and I have far overestimated the magnanimity of that great party who thought it their political duty to oppose him, if they should not be as glad as others to see justice done to his name; and that for their own sake as well as for his.

Upon such a character as Jackson's, declamation would be out of place. A pompous panegyric, "full of sound and fury signifying nothing," may be required to cover the defects of others; but he needs it not. The highest possible praise we can bestow on him will be to recount a few of the prominent events of his life in the plain style of simple narration. We must necessarily deal in dry matters of fact, and I give you notice that I intend to be as dull and tedious as the purpose I have in view requires that I should be.

Andrew Jackson had his birth in one of the back settlements of South Carolina some nine or ten years before the Declaration of Independence. Of his father little seems to be known, but his mother, who became a widow when he was two years old, must have been a most remarkable woman. When the tide of war rolled toward her neighborhood, with the devotedness of a Spartan mother, she sent out her three sons (all the children she had) to fight for their country. Even her youngest boy, not fourteen years of age, whose affectionate nature and quick intellect had made him the pride of her heart—even him she took away from the school where she was educating him for the ministry, and when his bright eye kindled with indignation at the story of his country's wrongs, she put the war-harness on his young limbs and told him to go forth and strike for the oppressed. Her eldest son fell at Stono. The two survivors were present at the battle of the Hanging Rock, and were taken prisoners after the defeat. By her energy and influence an exchange was effected, and she brought them home from Camden, wasted with disease and gashed with wounds. One of them reached home only in time to die there, and the other recovered as by a miracle. But before he was altogether well, his mother left the bedside of her youngest, her favorite and now her only child, to go on another errand of mercy—to convey some comforts and necessities to the poor prisoners at Charleston, who were



suffering there, as her sons had suffered at Camden, by cruelty and want. While there, she took the fever of the prison and died on her way home. She was a Christian and a heroine, and she died a martyr to the kindness of her own heart. No monument perpetuates her virtues, but her memory lives in the deathless fame of her son; and if a column were raised above her grave, high enough to pierce the clouds, no greater praise could be inscribed on it than this: that she was *WORTHY to be the mother of Andrew Jackson.*

When that young man arose from his bed—the only survivor of his family—he had time to count how much the independence of his country had cost him. Others were in a condition to serve the cause more effectually, but no one suffered more deeply than himself. He had seen his neighbors and friends slaughtered and hanged with shameless, cold-blooded cruelty, and their property pillaged, by an enemy calling himself civilized. His brothers had fallen in the strife, and his more than heroic mother had met her death in an effort to relieve the victims of oppression. The tyrants had not left him a relative on earth—“not a drop of his blood flowed in the veins of any living creature”—and in his own person he had endured captivity, and blows, and insults. No wonder that his high spirit, so sensitive to wrong and injury, should have hated tyranny, all his life afterward, with a deadly hatred—no wonder that his fervent nature became wedded forever with a love unchangeable to the liberty for which he had paid so dear a price.

After the peace, he worked a while at the trade of a saddler, then resumed his literary pursuits, completed his education, read law, was admitted to the bar, and soon afterward removed to Nashville.

The commencement of his practice is worth remembering. Nashville was settled by adventurers from every quarter—some of them scarcely as honest as they should have been—and the restraints of an organized society not being on them, they defied justice. Neither property nor life was secure. A number of these desperate men had gone largely in debt to the merchants and tradesmen of the place, and, having no fear of law before their eyes, had come to the resolution to repudiate their contracts. They had already secured all the professional assistance there, and as soon as Jackson arrived they offered to retain him also. He ascertained that they had no honest defense, and with a generous and manly scorn he put back their fees and scouted them from his presence. They tried to intimidate him, by threats of personal vengeance, from being concerned against them; but they found him as fearless as he was honest. He accepted the retainer of the creditors, and issued seventy writs the next day. Justice was triumphant, as it always was when he saw to its execution; and from that day Tennessee dates the supremacy of law and order within her boundaries.

His professional course, thus nobly begun, was worthily sustained. His talents, integrity, and keen appreciation of whatever was just, and his utter hatred of knavery in all its forms, soon won him the unbounded confidence of all good men and conquered the respect even of the bad. He was appointed Attorney-General of the Territory; and when Tennessee was ready to come into the Union, he was elected a member of the convention to form a Constitution. His intimate knowledge of and warm attachment for the broad principles of democratic liberty made him the observed of all observers in the convention. The Constitution framed by that body, with its liberal and comprehensive bill of rights, its careful separation of powers, and especially by its strong denunciation of monopolies, bears the full impress of his vigorous mind.

For his services in laying the foundation of their government, the people were thoroughly grateful, and they showed it by electing him to the highest office in their gift for which he was eligible. He was under the constitutional age of a Senator, and the new State had but one Representative in Congress. To this latter post they elected him unanimously.

During his service in Congress an incident occurred which ought to be mentioned, not merely because it was honorable to Jackson, but because his enemies have made it the subject of some railing accusations. General Washington's presidential term was drawing to a close, and he was about retiring from public life. A resolution was proposed, expressing the warmest affection for him, and great regret for the necessity of losing his services. To this part all were willing to assent. In that shape it would have passed unanimously; and, if there was one man in the House who loved Washington better than another, it was the young member from Tennessee. But the Federal or Anti-republican party determined to make some capital for themselves, and having a majority in the House, they so framed the resolve as to make it express their approbation of all the measures taken by his Cabinet. The pernicious funding system of Hamilton and the National Bank, chartered in 1791, on the recommendation of the same officer, reeking as both were with corruption, were to be indorsed with the rest. All motions to amend were promptly rejected, and the minority were given to understand that they must either say by their votes that they approved the obnoxious policy of Adams, Hamilton, and Knox, or else submit to the popular odium of appearing to oppose the greatest and best man that ever lived. The trick succeeded with nearly all; but there were two disciples of Jefferson there who had the moral courage to vote in the negative. I need not tell you that one of them was Andrew Jackson; for his moral courage never failed him. The other was Edward Livingston, his bosom friend throughout the most trying scenes of his subsequent life.



When he was barely the constitutional age he was elected to the Senate of the United States without solicitation and without opposition. He resigned his seat in that body before the close of the first session. He was there, however, long enough to show his devotion to sound principles by opposing the alien and sedition laws.

He was drawn from his retirement soon afterward by an appointment as Judge of the Supreme Court of his State. He was then but thirty-one years old, and is perhaps the only instance in this country of any man having reached so high a judicial station at a period of life so early. The office of a judge is not a place where shining talents can be made conspicuous; the bench is no place for brilliant displays; the utmost distinction its occupant can properly aim at, is the negative praise of having done no wrong. He kept the ermine unspotted, and no one but himself ever doubted his abilities. Long afterward, his most bitter political opponents, in recommending a man for the presidency who had sat upon the same bench, could think of no higher praise to bestow on the judicial character of their favorite than to say that his legal opinions were as sound and as able as those of Jackson. When he proposed to resign, the members of the Legislature addressed to him an earnest remonstrance, demanding of him, in the name of their common country, that his great powers of thought and independence of mind (I use their own language) should not be lost in retirement. At their request he held the office for six years. His resignation, when it did take place, was regretted by all, except those who were connected with an association of land-jobbers; and he had the honor to incur their enmity by exposing their frauds.

In February, 1812, Congress authorized the President to accept the service of fifty thousand volunteers. Twenty-five hundred Tennesseans agreed to volunteer, if Jackson would command them. He placed himself at their head and marched them to Natchez. There he was met by an order from the Government to dismiss his men at once, and deliver all his stores and public property to General Wilkinson. The result of his literal obedience would have been to send his troops home a distance of more than five hundred miles unorganized, unarmed, and unsupplied with provisions, through a howling wilderness, inhabited only by hostile Indians, without even a means of conveyance for the sick. He refused, of course. He *took the responsibility*. He delivered such stores as would not be absolutely needed on the way, marched his men back to Nashville, and discharged them there. The War Department afterward approved his conduct in not executing literally that improvident order.

In a few months after this, the whole population of Tennessee were stricken with horror by the intelligence from Fort Mimms, of the most ferocious massacre, the bloodiest and most relentless butchery recorded even in the annals of savage warfare. The Indians, instigated

by the British, had surprised the station and murdered men, women, and children indiscriminately. Similar atrocities were daily expected on other frontier settlements. In this extremity every eye was turned upon Jackson ; the hearts of the people would know no other leader. It happened that he was then confined to his bed with a broken limb. The Governor and a deputation of the Legislature went to his residence and told him of the demand for his services. His reply was : " All that is left of me belongs to my country, and in two weeks I shall be on horseback, if there is a spark of life in my body. In the mean time, raise the standard at Fayetteville, and let every man that can strike a blow gather around it." They told him the treasury was empty, and they had no means of equipping an army. But he had, not long before, converted a portion of his property into cash, and had, at the time, seven thousand dollars on deposit at Nashville ; that sum he directed the Governor to use in the purchase of provisions and arms. His fortune, as well as his life, was at the public disposal.

He took the field according to promise, and then commenced that career of magnificent victories which made his name immortal. He pushed into the heart of the enemy's country with a celerity of march which Cæsar could not have outstripped, exerted a vigilance that Fabius never exceeded, encountered difficulties that Hannibal might have been proud to overcome, and met his foes in battle with an impetuous courage that would have done honor to the personal prowess of Alexander.

I will not weary you with a detail of his military operations. The victorious battles of Emuckfaw, Talladega, and the Horseshoe, are not forgotten, and they never will be. Let no one suppose that these victories were won by the force of superior numbers and discipline over a weak and barbarous enemy. The enemy were savages, it is true, but altogether they outnumbered the troops under Jackson, they were well armed and provided, they were thoroughly acquainted with the country, they had ample scope for their characteristic cunning and treachery, they were led by the most distinguished braves of their respective nations, they were united and organized by the skill of Tecumseh, and their fierce passions were roused to madness by his fiery eloquence. Never since America was discovered have the red men mustered in more formidable force against the whites, never did their bloodthirsty nature impel them to deeds of greater cruelty, and never did they receive such a terrible scourging for their crimes.

But Jackson met other obstacles, such as could not have been surmounted by any man but himself. He had counted on the co-operation of some troops belonging to another division : the officer who commanded them refused to join him, or even to protect the posts in his rear. He moved on, notwithstanding. The provisions purchased with his own money were exhausted, and the State failed to supply



him with more. He was undismayed even by the prospect of famine. Almost in the presence of the enemy, a mutiny broke out among the militia, who claimed their discharge, and left the camp in a body. The general drew up the volunteers across the road and met the rebellious troops with fixed bayonets and muskets loaded. They knew they had to deal with a man who never threatened in vain, and they returned submissively to their quarters. The ringleaders were tried, condemned, and executed. By his seasonable and just severity, as well as by his singular address in allaying their fears and exciting their hopes, he extinguished every sign of discontent, and, in less than twelve hours, they were more attached to their commander than ever. But this change of sentiment in the militia was unknown to the volunteers. During the night, the spirit of insubordination began to pervade them too, and, supposing that no force could be found to prevent *their* departure, they started next morning for home. Their astonishment may be guessed at when they found the militia drawn up on the same spot which they themselves had occupied the day before, in the same attitude, and headed by the same unshrinking spirit. They could do nothing but promise submission and beg for mercy. The Governor of Tennessee, hearing of these things, unable to furnish the provisions, and despairing of Jackson's success in a condition so utterly forlorn, directed him to abandon the expedition and commence a retreat. He answered that he could do anything but turn his back on the enemies of his country, but if he ever did that, it would only be to lure them into a battle. All this while his men were literally starving; the general's own table was served with but a single dish, and that was acorns. They implored his permission to go home, and he promised that, if they would remain with him only two days longer, and if no provisions could be had in that time, he would make no further opposition to their return. The time having expired, and his word being pledged, he could no longer forbid their going. But he told them that if only two men of all his army would remain, he himself would stay and die on the ground. One hundred and twenty-five volunteered to stay, and with them he determined to maintain his position. The rest took up their homeward march, but had scarcely gone before the long-expected supplies came in. The general pursued and overtook them; but when he ordered them to return, they declared their unanimous resolution to disobey him. Here, then, was another mutiny—not in half his army, but the whole of it—one that he was obliged to deal with alone, and on the instant. He placed himself in front, and declared that, if they proceeded farther, it must be over his dead body. By way of showing that his life would be dearly sold, he unslung a carbine from his shoulder and announced his determination to shoot the first man who advanced a step. The muskets along the line were leveled at his breast; one only was fired, and the bullet whistled over

his head. He sat in his saddle unmoved. "Return," said he, "to your duty, or take the life of your general; you have your choice." Overawed by his undaunted boldness, and struck with admiration at his noble bearing, they felt their old affections revive in full force. They wavered a moment, then grounded their arms, and told him that wherever he would lead they were ready to follow. It was with these same troops, and after all these occurrences, that he made that gallant fight at Enotochopco, gained the decisive victory at Emuckfaw, and won the bloody day at Tohopeka.

The next year was the defense of Fort Bowyer—the taking of Pensacola—and, in the latter part of it, some preparations for the battle of New Orleans.

If there be one point or period in his history which needs no comment at all, it is that which relates to the latter achievement. The American people understand the debt of gratitude they incurred that day, and their children have all its history by heart. The finest army that ever landed on American soil; thoroughly equipped; trained for years under the eye of Wellington; composed of veterans, who had met the conqueror of Europe and driven his legions back; who had crimsoned the waters of the Douro with the blood of their enemies; who had tasted plunder at the storming of Badajoz; who had reveled in licentiousness at St. Sebastian, and whose mercenary valor was here again to be rewarded with "beauty and booty"—against such a force, more than fourteen thousand strong, Jackson, with half the number of raw levies, was to defend the richest city of the Union, which, if taken, would have given to the enemy the command of the Mississippi and the whole West from the Gulf of Mexico to the heart of Pennsylvania. And that city was not a Gibraltar or a Quebec—it had no natural advantages of position—no military works—no wall—no

". . . high-raised battlement,  
Strong tower, or moated gate."

It was situated on an open plain, with a hundred inlets to be guarded, and all means of defense were yet to be created by the genius and energy of its defender. No wonder the Legislature of Louisiana were in favor of surrendering the city, instead of making a stand for its defense under circumstances which seemed so entirely hopeless.

But, in Jackson's vocabulary the word *surrender* was never found. The foremost division of the enemy was scarcely within striking distance when he was upon them. His effective force at that time was hardly fifteen hundred men. But they were men who knew their leader, and whose hearts were filled with a portion of his own spirit. With that little band he attacked a camp guarded by seven thousand of an army that called and believed itself invincible. The bloody fight



that ensued, indecisive as it was, would stand among the proudest achievements of American arms, if its brilliancy had not been dimmed by the great battle which closed the war; and if the eighth of January could be stricken from the calendar, the twenty-third of December would be celebrated forever. But the eighth of January did come, and with it the sun of Jackson's military glory rose to its zenith. He was everywhere hailed as the great deliverer of the country. Gratitude and joy welled forth from the popular heart as from a fountain, and when the sage of Monticello invoked "honor" upon him who had filled the measure of his country's glory and fame, the sentiment was heard and responded to from one end of the Union to the other. Consider what he had to do, and how he did it, and then let your own hearts tell you which was right, the people who met him with acclamations of joy and delight, or the judge who fined him a thousand dollars.

I will not pause upon the minor incidents of that great event, nor stop to defend his proclamation of martial law. The nation's judgment on this part of his conduct has been given in more forms than one. The far-famed Seminole campaign must be passed in silence. His triumphant vindication of himself from the charges growing out of his service during that expedition will be remembered by his friends, and I hope his opponents may never forget it. Time would fail us, if we should recount the scenes through which he passed, from the close of his military career to the commencement of his first presidential term. Admiration would, indeed, love to linger on his thorough vindication of justice as Governor of Florida, on his manly bearing when the people named him as their candidate for the highest station in the world, as well as on his dignified submission, when he saw another placed in the great office which the affectionate gratitude of the people had designated as the reward of his own services.

When finally he was placed at the head of the republic, not only by the will of the people, but according to the forms of the Constitution, he showed the world, whose gaze was on him, that he was *not* a mere "military chieftain." The courage, which never cowered before an enemy, was indeed there; the iron will, the fiery soul, the heart of steel, and the nerve of adamant, were with him still. But there also was the comprehensive intellect, the rapid power of combination, the intuitive perception of whatever was noble or good—above all, there was still the enthusiastic patriotism, which dedicated his whole being to the country that he loved—loved with all his fervor of devotion.

When the Maysville Road Bill passed both Houses of Congress by immense majorities, developing a system at war with the Constitution, but in perfect keeping with the wild spirit of speculation and reckless expenditure which afterward swept so many of the States to financial ruin, it was his sagacity that saw the distant danger, and his firmness

that applied the remedy. He crushed without hesitation a measure which had the support of all parties. No truckling to popular errors ; no wooing of powerful interests ; no base appeal to the sordid passions ; no baiting of traps to catch the favor of the people, ever disgraced his manly statesmanship. He was as ready to stem the torrent when it was wrong, as to swim with the tide when it set in the true direction. Upon this part of his history, time and reflection have put all right, and the only thing now left to excite our special wonder is, that others, who passed for wise men in their day and generation, should not have seen the subject in as true a light as he did.

Nullification reared its head—the Union was to be severed, because one of the States was displeased with a law. Jackson was at his post. He never stopped to parley with the danger, or to bandy words with the wrong-doers. He spoke not in the language of expostulation, advice, or entreaty, but in the decisive and unequivocal tone of one who knew that it was his duty and his right to *command*. “The Union,” said he, “*must* and it *shall* be preserved” ; and from that moment nullification was doomed.

But another foe, more deadly and dangerous than any he had yet encountered, was still to be grappled with. A great corporation with a capital of thirty-five millions of dollars ; wielding debts to the amount of seventy millions, against men of all classes, professions, and grades ; intimately connected with all the ramifications of private business ; and holding the public funds of the Government in its custody—demanded his signature to a new charter. He knew that the corporators had misbehaved themselves grossly—how grossly I shall not stop to tell—and he made no compromise with wrong. In the Constitution he had sworn to preserve, protect, and defend, he found no warrant for such a law ; and he kept his oath. But his veto was scarcely read, before the bank bounded into the arena, armed to the teeth, and followed by a host of friends. To cripple her power and save the country from loss, he removed the public deposits, a measure which cooled many of his friends, while it fairly infuriated his enemies. The combat deepened every hour. To an eye unable to penetrate the sources of his influence, it seemed that he was about to be crushed at last. The bank suddenly withdrew her discounts, curtailed her circulation, pressed her debtors to the wall ; and the consequence was, that formal committees, from every part of the Union, waited on the President, by thousands, with bitter complaints of the distress which they had been taught to believe was brought upon the country by him. Two thirds of the presses, three fourths of the orators and writers of the nation were exerting all their powers of invective, argument, and ridicule to bring contempt and hatred upon his character. The Senate, containing “the garnered talent of the nation”—the tribunal to which he had a right to look for a calm decision, for they



were his judges in the last resort—accused and convicted him without a hearing. Physical force began to be talked of, anonymous letters warned him that assassins were watching for his life; “armed committees of ten thousand” were proposed; an “encampment upon Capitol Hill” was threatened; and “a revolution, *bloodless as yet*,” was announced to the public on the highest authority.

In all this storm of passionate declamation—amid this “loud roar of foaming calumny”—his firm soul never blenched even for an instant. He changed no principle, he retracted no opinion, he surrendered no truth, he gave up not one inch of the high ground he had taken. In this the sorest trial his faith had ever endured, “he bated no jot of heart or hope,” but kept right onward in the path of his duty. The test was too severe for his summer friends, and they fell away from his support by scores and hundreds; but he was

“ . . . constant as the northern star,  
Of whose true, fixed, and resting quality  
There is no fellow in the firmament.”

The electric chain of communication between him and the people was still unbroken, and whatever link of that chain was struck by his master-hand, the response was a deep thrill of sympathy from the hearts of the million. His steady and fearless voice was heard through his messages, above the din of the conflict, and it went over the land like the tones of a trumpet, ringing full on the ear, banishing doubt, inspiring confidence, and swelling the heart with a foretaste of victory. His friends, who had doubted his wisdom, began to wonder at their own want of discernment, and the great old chief, who had led them through so many contests, was proved to be right once more.

He was followed to his retirement by a warmth of popular affection which had never been bestowed on any but one man before. His declining years were surrounded with all

“Those things that should accompany old age  
As honor, love, obedience, troops of friends.”

He lived long enough to see his most cherished hopes accomplished—his principles stamped upon the public mind—his own example made the standard of political orthodoxy. He saw the people rejudge the judgment of his adversaries, and expunge their sentence of condemnation from the record. He beheld the nation rising as one man and tendering to him a restitution of the fine imposed on him for saving the country.

He had fulfilled all the purposes of his mission to the earth; he had finished the work which God had given him to do; and it was his *time* to die—time that his great spirit should be freed from the

fretting chain which bound it to the lower world—time that his labors should cease and his hallowed rest begin. He closed his long list of triumphs with the crowning triumph of the Christian's hope, and ended his conquering career by another conquest, which robbed the grave of its victory, and took the sting from death.

All that is mortal of Jackson has died. But his fame lives and will live forever. America will never forget her defender, the people will never fail to think with gratitude of their truest friend, the human race will never cease to pay the homage of profound admiration to the benefactor of the world.

In the character of a private gentleman, no man of his time was more admired by those who knew him than General Jackson. All, who have ever seen him, concur in bearing testimony to the charms of his manner and the courtly grace of his deportment. This was not the result of an artificial polish; his politeness flowed naturally from a kind, true heart.

In all the relations of life he was sternly and inflexibly honest. No broken covenants, no violated obligations, rested on his conscience. When yet a comparatively young man, and before his fame became, as it afterward was, the public property of the nation, the misconduct of one whom he had trusted, made him, not legally, but as he thought morally, liable for an amount of debts equal to the value of all his property. Although he had not made the contracts, and had received no benefit from them, and the law would have acquitted him from all obligation to pay them, he nevertheless gave up his stately home to the creditors of his false friend, retired with his family to a rude log cabin in a new clearing, and, rather than stain his character with an act of apparent wrong, his resolute soul faced poverty without a murmur.

His education was not of the kind usually supposed necessary to make what is called an accomplished scholar. He had not those immense acquirements, which, in some men, overlay the mind and master the power of original thought. His researches were not for ornament, but for use; it was not the flowers of literature, but the fruit, that attracted him. His understanding was eminently practical, and stored, not with fictions, but with truths. While history, ancient and modern, sacred and profane, was familiar to him, it is, I suppose, extremely probable that he never read a novel in his life. His style was logical, vigorous, dignified, and characterized by the lucid order and clear reasoning which mark the production of a master—it was the eloquence of truth, spoken by one who both felt and understood it. Some of his orders, messages, and protests are not exceeded, in the impressive force of their diction, by any public papers in the world, except only by the Declaration of Independence.

As a lawyer, no man ever understood better than he did the great



secret of success in an honest community. I mean the moral rectitude which always supports justice and always frowns upon fraud. It may be that he was no great adept in the mere technical tricks of the trade. We do not hear that *he* ever caused an innocent man to be executed, or cheated public justice out of a guilty victim. He had none of the glowing speech which could make the worse appear the better reason ; and no truly great man *ever* had it. He "affected not the devilish skill of outbaffling right, nor aimed at the shameful glory of making a bad cause good." But he could present truth in the proper attractions of its own beauty, and falsehood shrank away from the piercing scrutiny of his investigation. As a science, he had thoroughly mastered the law. Those great principles which have their home in the honest heart ; the wisdom which tries all things by the standard of natural justice ; the unclouded steadiness of mental vision, which looks quite through the mists of sophistry ; the resistless vigor of mind, which brushes away the artificial impediments that obstruct the road to truth ; the luminous understanding which sends a stream of light into every dark corner where fraud might lurk to hide itself ; the sterling integrity, which braves all danger in the cause of justice—all these he had, and they made him a lawyer great in the truest sense of the word. These qualities it was that enabled him, when his foot was barely on the threshold of business, to stand unawed before the pistols of seventy desperadoes, rather than soil his hands by undertaking their false defense. They gave dignity and grace to his judicial character and made his public papers unanswerable. They extorted from the Chief-Justice of the United States the declaration that he was the profoundest constitutional lawyer in the country ; and compelled the most distinguished members of Congress, when the Seminole campaign was discussed, and after his defense was read, to admit that Jackson, in the woods of Alabama, and with no authorities to consult, understood and explained the rules of international law better than any man at Washington with the aid of all the books in the public library.

Among the military leaders of this country, whose talents were developed by the last war, Jackson stands alone and peerless, without a rival to come near him. He had all the qualities of a great commander—courage, vigilance, activity, and skill. His attack was the kingly swoop of the eagle on his prey, and his defense was like that of the roused lion when he stands at bay in his native jungle. His character in this department is indeed *sui generis* altogether. The history of the world contains no record of any man who has done so much, and done it so well, with means so inadequate. He was *not* a "fortunate soldier." All the circumstances with which he was surrounded were adverse. But his daring spirit made Fortune bend to him, and compelled her to bless his standard with a success she never meant for him.

It is not, however, upon his military services that his fame rests principally. His defense of our Constitution deserves, and posterity will pay to it, a higher praise than his deeds of arms are entitled to. For him peace had her victories far *more* renowned than those of war. They elicited from him higher qualities of mind and heart. The nerve that meets an enemy on the field is comparatively a cheap virtue, for thousands in all ages have had it. But it is not once in a century that a man is born with the high *moral* courage which fits him to take the lead in a great reform. He who supports political truth must indeed be well armed in

“The strong breast-plate of a heart untainted,”

if he can endure the lingering warfare which will be waged against his reputation by that “wild and many-weaponed throng” which always opposes the progress of liberal principles. This priceless gift was bestowed on Jackson in all its perfection, and it placed him in the very front of the world's march. He saw further into futurity than any man of his time, and his was the fearless honesty to tell his countrymen what he did see. He had a heart full of hope and manly trust in the people; and they were true to him, because he was true to them. He pursued wise ends by fair means, and in doing so he knew fear only by name. No abuse was too sacred, nor no fraud too popular, for the unsparing hand of his reform. He was no demagogue to fawn upon the masses and flatter their prejudices. He spoke to them like a friend, for he was their friend—their devoted and faithful friend—but he told them plain truth, whether they liked to hear it or not. He knew that no appeal for evil purposes could be made to any people so successfully as one addressed to their covetousness, and that no deity had votaries so faithful or so numerous as those of Mammon, the meanest and “the least erect of all the spirits that fell.” He saw the frightful superstition which made strong men bow before the shrine of that base idol, covering the nation as with a dark pall, and weaning the hearts of the people from the worship of liberty and justice. Did he encourage their strong delusion by joining in the adoration? No; he struck at the false god in his very temple, and took his priests by the beard even between the horns of the altar.

He has been called ambitious. In one sense this accusation of his enemies coincides exactly with the praises of his friends. He *was* ambitious. But his was the ambition of a noble nature—an affectionate yearning to be loved by his country as he loved her—an intense desire to leave behind him a name hallowed by its association with great and beneficent actions—and to sleep at last in a grave made sacred by the veneration of the wise and the virtuous. Let those who object to such ambition make their worst of it. But, if



any one supposes that his life was at all influenced by the vulgar love of power for its own sake, or by the sordid desire to pocket the emoluments of public station, let him remember this : that there never was a period, from Jackson's arrival at the age of twenty-one till the day of his death, when he might not have been in the public service if he had so chosen ; yet he spent more than half his time in private retirement. He never in his life, upon any occasion, solicited the people or any of their appointing agents for a place. His countrymen pressed upon him eleven different offices, without any procurement of his. Some of them he accepted with reluctance, and *all of them he resigned* before the terms expired, except one : that one he surrendered back to the people after having held it as long as Washington held it before him.

Others have said that he was overbearing and tyrannical—a contemner of all authority. No one can deny that he *was* a man of strong will, impetuous passions, and fiery temper. But he was most emphatically a law-abiding man. If there ever lived one who would go further to defend the Constitution and laws of his country, or more cheerfully shed his blood to save them from violation, neither history nor tradition has told us who he was. There is not a solitary act of his life among the many adduced to support this charge, which is not capable of a most clear and satisfactory defense. It is certain that, when engaged in the public service, he never suffered any one to interfere with his plans. When he formed them, he executed them, and if it became necessary to do so, he was ready to stake, not only his mortal existence, but his character (which was infinitely dearer to him) on the issue. It is this unequalled *moral* courage which lifts him so high above common great men. Others have been willing to die for their country, but he periled life, fortune, and fame together. And let it never be forgotten that these things were uniformly done in defense of public liberty—it was always for his country, never for himself, that he “took the responsibility.” Malice will not dare to say that the smallest taint of selfishness ever mingled with any of these transactions, and the blindest folly is not so stupid as to believe that his conduct in them could have been swayed by motives arising out of his personal interest. The strongest case ever cited against him will serve as an example. When he was defending New Orleans, he was surrounded with spies and traitors, and to prevent them from communicating with the enemy or stirring up sedition in his camp, it was necessary to proclaim martial law—necessary, according to the testimony of all witnesses—absolutely and imperatively necessary, according to the admission of Judge Hall himself. By that measure, the country could be saved ; without it, there was no hope. Under these circumstances, the temporary restraint upon Louallier and Hall were trifles light as air in his eyes ; for he weighed them in the scale

with a nation's liberty for ages. But when he had won the great battle, when his brows were wreathed with victory, when his country was safe and he alone was in danger, he bowed his laureled head to the authority of the court with a submission as lowly as the humblest—nay, he protected the judge from the indignation of the multitude while he pronounced the most infamous sentence that ever stained a record.

But I have done. It was, perhaps, unnecessary to say so much. The character of Jackson is becoming better and better understood every day. Our children will marvel what manner of men their fathers were, among whom there could be a difference of opinion about the merits of such a man. The time is speeding rapidly on when he will be appreciated by all, without distinction of party or sect; and then it will not be necessary to couple his defense with his eulogy. His fame, like a mighty river, will grow wider and deeper as it rolls downward. The wreaths on other brows may fall away, leaf after leaf withered and faded, but time will only add a greener freshness to the everlasting verdure of his laurels. In the constellation of talents and worth, which adorns the firmament of American glory, there is not one star before whose bright astrology the future friend of human liberty will kneel with a more fervent devotion. In all coming time, wherever a true American shall be found, if there be one pulse within his free-born bosom that beats more proudly than another, he will feel it throb when he hears the name of ANDREW JACKSON.

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#### ON THE DEATH OF JUDGE GIBSON.

It is unnecessary to say that every surviving member of the court is deeply grieved by the death of Mr. Justice Gibson. In the course of nature it was not to be expected that he could live much longer, for he had attained the ripe age of seventy-six. But the blow, though not a sudden, was nevertheless a severe one. The intimate relations, personal and official, which we all bore to him, would have been sufficient to account for some emotion, even if he had been an ordinary man. But he was the Nestor of the bench, whose wisdom inspired the public mind with confidence in our decisions. By this bereavement the court has lost what no time can repair; for we shall never look upon his like again.

We regarded him more as a father than a brother. None of us ever saw the Supreme Court before he was in it; and to some of us his character as a great judge was familiar even in childhood. The earliest knowledge of the law we had was derived in part from his lumi-



nous expositions of it. He was a judge of the Common Pleas before the youngest of us was born, and was a member of this court long before the oldest was admitted to the bar. He sat here with twenty-six different associates, of whom eighteen preceded him to the grave. For nearly a quarter of a century he was Chief-Justice, and, when he was nominally superseded by another, as the head of the court, his great learning, venerable character, and overshadowing reputation, still made him the only chief whom the hearts of the people would know. During the long period of his judicial labors he discussed and decided innumerable questions. His opinions are found in no less than seventy volumes of the regular reports, from 2 Sergeant & Rawle to 7 Harris.

At the time of his death he had been longer in office than any contemporary judge in the world; and in some points of character he had not his equal on the earth. Such vigor, clearness, and precision of thought were never before united with the same felicity of diction. Brougham has sketched Lord Stowell justly enough as the greatest judicial writer that England could boast of, for force and beauty of style. He selects a sentence, and calls on the reader to admire the remarkable elegance of its structure. I believe that Judge Gibson never wrote an opinion in his life from which a passage might not be taken, stronger as well as more graceful in its turn of expression, than this which is selected with so much care, by a most zealous friend, from *all* of Lord Stowell's.

His written language was a transcript of his mind. It gave the world the very form and pressure of his thoughts. It was accurate, because he knew the exact boundaries of the principles he discussed. His mental vision took in the whole outline and all the details of the case, and with a bold and steady hand he painted what he saw. He made others understand him, because he understood himself.

" . . . cui lecta potenter erit res,  
Nec facundia deseret hunc, nec lucidus ordo."

His style was rich, but he never turned out of his way for figures of speech. He never sacrificed sense to sound, or preferred ornament to substance. If he reasoned much by comparison, it was not to make his composition brilliant, but clear. He spoke in metaphors often; not because they were sought, but because they came to his mind unbidden. The same vein of happy illustration ran through his conversation and his private letters. I was most of all struck with it in a careless memorandum, intended, when it was written, for no eye but his own. He never thought of display, and seemed totally unconscious that he had the power to make any.

His words were always precisely adapted to the subject. He said neither more nor less than just the thing he ought. He had one faculty of a great poet—that of expressing a thought in language

which could never afterward be paraphrased. When a legal principle passed through his hands, he sent it forth clothed in a dress which fitted it so exactly that nobody ever presumed to give it any other. Almost universally the syllabus of his opinion is a sentence from itself; and the most heedless student, in looking over Wharton's Digest, can select the cases in which Gibson delivered the judgment, as readily as he would pick out gold coins from among coppers. For this reason it is, that though he was the least voluminous writer of the court, the citations from him at the bar are more numerous than from all the rest put together. Yet the men who shared with him the labors and responsibilities of this tribunal (of course I am not referring to any who are now here) stood among the foremost in the country for learning and ability. To be their equal was an honor which few could attain; to excel them was a most pre-eminent distinction.

The dignity, richness, and purity of his written opinions was by no means his highest title to admiration. The movements of his mind were as strong as they were graceful. His periods not only pleased the ear, but sank into the mind. He never wearied the reader, but he always exhausted the subject. An opinion of his was an unbroken chain of logic, from beginning to end. His argumentation was always characterized by great power, and sometimes it rose into irresistible energy, dashing opposition to pieces with force like that of a battering-ram.

He never missed the point even of a cause which had been badly argued. He separated the chaff from the wheat almost as soon as he got possession of it. The most complicated entanglement of fact and law would be reduced to harmony under his hands. His arrangement was so lucid that the dullest mind could follow him with that intense pleasure which we all feel in being able to comprehend the workings of an intellect so manifestly superior.

Yet he committed errors. It is wonderful that in the course of his long service he did not commit more. A few were caused by inattention; a few by want of time; a few by preconceived notions which led him astray. When he did throw himself into the wrong side of a cause, he usually made an argument which it was much easier to overrule than to answer. With reference to his erroneous opinions, he might have used the words of Virgil, which he quoted so happily in *Eakin vs. Raub* (12 Ser. & R.) for another purpose:

“ . . . Si Pergama dextrâ  
Defendi possent, etiam hâc defensa fuissent.”

But he was of all men the most devoted and earnest lover of truth for its own sake. When subsequent reflection convinced him that he had been wrong, he took the first opportunity to acknowledge it. He



was often the earliest to discover his own mistakes, as well as the foremost to correct them.

He was inflexibly honest. The judicial ermine was as unspotted when he laid it aside for the habiliments of the grave as it was when he first assumed it. I do not mean to award him merely that commonplace integrity which it is no honor to have, but simply a disgrace to want. He was not only incorruptible, but scrupulously, delicately, conscientiously free from all willful wrong, either in thought, word, or deed.

Next, after his wonderful intellectual endowments, the benevolence of his heart was the most marked feature of his character. His was a most genial spirit; affectionate and kind to his friends, and magnanimous to his enemies. Benefits received by him were engraved on his memory as on a tablet of brass; injuries were written in sand. He never let the sun go down upon his wrath. A little dash of bitterness in his nature would, perhaps, have given a more consistent tone to his character, and greater activity to his mind. He lacked the quality which Dr. Johnson admired. He was *not* a good hater.

His accomplishments were very extraordinary. He was born a musician, and the natural talent was highly cultivated. He was a *connoisseur* in painting and sculpture. The whole round of English literature was familiar to him. He was at home among the ancient classics. He had a perfectly clear perception of all the great truths of natural science. He had studied medicine carefully in his youth and understood it well. His mind absorbed all kinds of knowledge with scarcely an effort.

Judge Gibson was well appreciated by his fellow-citizens: not so highly as he deserved; for that was scarcely possible. But admiration of his talents and respect for his honesty were universal sentiments. This was strikingly manifested when he was elected, in 1851, notwithstanding his advanced age, without partisan connections, with no emphatic political standing, and without manners, habits, or associations calculated to make him popular beyond the circle that knew him intimately. With all these disadvantages, it is said he narrowly escaped what might have been a dangerous distinction—a nomination on both of the opposing tickets. Abroad he has, for very many years, been thought the great glory of his native State.

Doubtless the whole Commonwealth will mourn his death; we all have good reason to do so. The profession of the law has lost the ablest of its teachers, this court the brightest of its ornaments, and the people a steadfast defender of their rights, so far as they were capable of being protected by judicial authority. For myself, I know no form of words to express my deep sense of the loss we have suffered. I can most truly say of him what was said, long ago, concerning one of the few among mortals who were yet greater than he: "I

did love the man, and do honor his memory, on this side idolatry, as much as any."

As a token of respect for the deceased, it is ordered that the court do now adjourn.

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#### ON THE DEATH OF SENATOR CARPENTER.

THE American bar has not often suffered so great a misfortune as the death of Mr. Carpenter. He was cut off when he was rising as rapidly as at any previous period. In the noontide of his labors the night came, wherein no man can work. To what height his career might have reached if he had lived and kept his health another score of years, can now be only a speculative question. But when we think of his great wisdom and his wonderful skill in the forensic use of it, together with his other qualities of mind and heart, we can not doubt that in his left hand would have been uncounted riches and abundant honor, if only length of days had been given to his right. As it was, he distanced his contemporaries, and became the peer of the greatest among those who had started long before him.

The intellectual character of no professional man is harder to analyze than his. He was gifted with an eloquence *sui generis*. It consisted of free and fearless thought wreaked upon expression powerful and perfect. It was not fine rhetoric, for he seldom resorted to poetic illustration; nor did he make a parade of clinching his facts. He often warmed with feeling, but no bursts of passion deformed the symmetry of his argument. The flow of his speech was steady and strong as the current of a great river. Every sentence was perfect; every word was fitly spoken; each apple of gold was set in its picture of silver. This singular faculty of saying everything just as it ought to be said was not displayed only in the Senate and in the courts; everywhere, in public and private, on his legs, in his chair, and even lying on his bed, he always "talked like a book."

I have sometimes wondered how he got this curious felicity of diction. He knew no language but his mother-tongue. The Latin and Greek which he learned in boyhood faded entirely out of his memory before he became a full-grown man. At West Point he was taught French, and spoke it fluently; in a few years afterward he forgot every word of it. But perhaps it was not lost; a language (or any kind of literature), though forgotten, enriches the mind as a crop of clover plowed down fertilizes the soil.

His youth and early manhood was full of the severest trials. After leaving the Military Academy he studied law in Vermont, and was admitted, but conscientiously refused to practice without further



preparation. He went to Boston, where he was most generously taken into the office of Mr. Choate. He soon won not only the good opinion of that very great man, but his unqualified admiration and unbounded confidence. With the beneficence of an elder brother, Choate paid his way through the years of his toilsome study, and afterward supplied him with the means of starting in the West. The bright prospect which opened before him in Wisconsin was suddenly overshadowed by an appalling calamity. His eyes gave way, and trusting to the treatment of a quack, his sight was wholly extinguished. For three years he was stone-blind, "the world by one sense quite shut out." Totally disabled and compassed round with impenetrable darkness, he lost everything except his courage, his hope, and the never-failing friendship of his illustrious preceptor. Supported by these, he was taken to an infirmary at New York, where, after a long time, his vision was restored. Subsequent to these events, and still under the auspices of Mr. Choate, he returned to Wisconsin and fairly began his professional life.

It would be interesting to know what effect upon his mental character was produced by his blindness. I believe it elevated, refined, and strengthened all his faculties. Before that time much reading had made him a very full man; when reading became impossible, reflection digested his knowledge into practical wisdom. He perfectly arranged his storehouse of facts and cases, and pondered intently upon the first principles of jurisprudence. Thinking with all his might, and always thinking in English, he forgot his French, and acquired that surprising vigor and accuracy of English expression which compel us to admit that, if he was not a classical scholar, he was himself a classic of most original type.

He was not merely a brilliant advocate, learned in the law, and deeply skilled in its dialectics; in the less showy walks of the profession he was uncommonly powerful. Whether drudging at the business of his office as a common-law attorney and equity pleader, or shining as leader in a great *nisi prius* cause, he was equally admirable, ever ready and perfectly suited to the place he was filling. This capacity for work of all kinds was the remarkable part of his character. With his hands full of a most multifarious practice he met political duties of great magnitude. As a Senator and party-leader he had burdens and responsibilities under which, without more, a strong man might have sunk. But this man's shoulders seemed to feel no weight that was even inconvenient. If Lord Brougham did half as much labor in quantity and variety, he deserved all the admiration he won for versatility and patience.

Mr. Carpenter's notions of professional ethics were pure and high-toned. He never acted upon motives of lucre or malice. He would take what might be called a bad case, because he thought that every

man should have a fair trial ; but he would use no falsehood to gain it ; he was true to the court as well as to the client. He was the least mercenary of all lawyers ; a large proportion of his business was done for nothing.

Outside of his family he seldom spoke of his religious opinions. He was not accustomed to give in his experience—never at all to me. He firmly believed in the morality of the New Testament, and in no other system. If you ask whether he practiced it perfectly, I ask in return, Who has ? Certainly not you or I. He was a gentle censor of our faults ; let us not be rigid with his. One thing is certain : his faith in his own future was strong enough to meet death as calmly as he would expect the visit of a friend. Upward of a year since his physicians told him that he would certainly die in a few months, and he knew they were right ; but, with that inevitable doom coming visibly nearer every day, he went about his business with a spirit as cheerful as if he had a long lease of life before him.

I think for certain reasons that my personal loss is greater than the rest of you have suffered. But that is a "fee grief due to my particular breast." It is enough to say for myself that I did love the man in his lifetime, and do honor his memory now that he is dead.



## POLITICAL ESSAYS AND LETTERS.

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### OBSERVATIONS ON TERRITORIAL SOVEREIGNTY.—REPLIES TO SENATOR DOUGLAS.

#### I.

EVERY one knows that Mr. Douglas, the Senator from Illinois, has written and printed an elaborate essay, comprising thirty-eight columns of "Harper's Magazine," in which he has undertaken to point out the "dividing-line between Federal and local authority." Very many persons have glanced over its paragraphs to catch the leading ideas without loss of time, and some few have probably read it with care.

Those who dissent from the doctrines of this paper owe to its author, if not to his arguments, a most respectful answer. Mr. Douglas is not the man to be treated with a disdainful silence. His ability is a fact unquestioned; his public career, in the face of many disadvantages, has been uncommonly successful; and he has been for many years a working, struggling candidate for the presidency. He is, moreover, the Corypheus of his political sect, the founder of a new school, and his disciples naturally believe in the infallible verity of his words as a part of their faith.

The style of the article is, in some respects, highly commendable. It is entirely free from the vulgar clap-trap of the stump, and has no vain adornment of classical scholarship. But it shows no sign of the eloquent Senator; it is even without the logic of the great debater. Many portions of it are very obscure. It seems to be an unsuccessful effort at legal precision, like the writing of a judge who is trying in vain to give good reasons for a wrong decision on a question of law which he has not quite mastered.

With the help of Messrs. Seward and Lincoln, he has defined accurately enough the platform of the so-called Republican party; and he does not attempt to conceal his conviction that their doctrines are in the last degree dangerous. They are, most assuredly, full of evil and saturated with mischief. The "irrepressible conflict," which

they speak of with so much pleasure between the "opposing and enduring forces" of the Northern and Southern States, will be fatal, not merely to the peace of the country, but to the existence of the Government itself. Mr. Douglas knows this, and he knows also that the Democratic party is the only power which is or can be organized to resist the Republican forces or oppose their hostile march upon the capital. He who divides and weakens the friends of the country at such a crisis in her fortunes assumes a very grave responsibility.

Mr. Douglas separates the Democratic party into three classes, and describes them as follow :

"1. Those who believe that the Constitution of the United States neither establishes nor prohibits slavery in the States or Territories beyond the power of the people legally to control it, but 'leaves the people thereof perfectly free to form and regulate their domestic institutions in their own way, subject only to the Constitution of the United States.'

"2. Those who believe that the Constitution establishes slavery in the Territories, and withholds from Congress and the Territorial Legislature the power to control it, and who insist that, in the event the Territorial Legislature fails to enact the requisite laws for its protection, it becomes the imperative duty of Congress to interpose its authority and furnish such protection.

"3. Those who, while professing to believe that the Constitution establishes slavery in the Territories beyond the power of Congress or the Territorial Legislature to control it, at the same time protest against the duty of Congress to interfere for its protection ; but insist that it is the duty of the judiciary to protect and maintain slavery in the Territories without any law upon the subject."

We give Mr. Douglas the full benefit of his own statement. This is his mode of expressing those differences, which, he says, disturb the harmony and threaten the integrity of the American Democracy. These passages should, therefore, be most carefully considered.

The first class is the one to which he himself belongs, and to both the others he is equally opposed. He has no right to come between the second and third class. If the difference which he speaks of does exist among his opponents, it is their business, not his, to settle it or fight it out. We shall therefore confine ourselves to the dispute between Mr. Douglas and his followers on the one hand, and the rest of the Democratic party on the other, presuming that he will be willing to observe the principle of non-intervention in all matters with which he has no concern.

We will invert the order in which he has discussed the subject, and endeavor to show—

1. That he has not correctly stated the doctrine held by his opponents ; and,
2. That his own opinions, as given by himself, are altogether unsound.



I. He says that a certain portion of the Democratic party believe, or profess to believe, that *the Constitution establishes slavery* in the Territories, and insist that it is the duty of the judiciary to maintain it there *without any law* on the subject. We do not charge him with any intention to be unfair; but we assert that he has in fact done wrong to, probably, nineteen twentieths of the party, by attempting to put them on grounds which they never chose for themselves.

The Constitution certainly does not *establish* slavery in the Territories, nor anywhere else. Nobody in this country ever thought or said so. But the Constitution regards as sacred and inviolable all the rights which a citizen may legally acquire in a State. If a man acquires property of any kind in a State, and goes with it into a Territory, he is not for that reason to be stripped of it. Our simple and plain proposition is, that the legal owner of a slave or other chattel may go with it into a Federal Territory without forfeiting his title.

Who denies the truth of this, and upon what ground can it be controverted? The reasons which support it are very obvious and very conclusive. As a jurist and a statesman, Mr. Douglas ought to be familiar with them, and there was a time when he was supposed to understand them very well. We will briefly give him a few of them:

1. It is an axiomatic principle of public law that a right of property, a private relation, condition, or *status*, lawfully existing in one State or country, is not changed by the mere removal of the parties to another country, unless the law of that other country be in direct conflict with it. For instance: A marriage legally solemnized in France is binding in America; children born in Germany are legitimate here if they are legitimate there; and a merchant who buys goods in New York, according to the laws of that State, may carry them to Illinois and hold them there under his contract. It is precisely so with the *status* of a negro carried from one part of the United States to another; the question of his freedom or servitude depends on the law of the place where he came from, and depends on that alone, if there be no conflicting law at the place to which he goes or is taken. The Federal Constitution, therefore, recognizes slavery as a legal condition wherever the local governments have chosen to let it stand unabolished, and regards it as illegal wherever the laws of the place have forbidden it. A slave being property in Virginia, remains property; and his master has all the rights of a Virginia master wherever he may go, so that he go not to any place where the local law comes in conflict with his right. It will not be pretended that the Constitution itself furnishes to the Territories a conflicting law. It contains no provision that can be tortured into any semblance of a prohibition.

2. The dispute on the question whether slavery or freedom is local or general is a mere war of words. The black race in this country is neither bond nor free by virtue of any general law. That portion of



it which is free is free by virtue of some local regulation, and the slave owes service for a similar reason. The Constitution and laws of the United States simply declare that everything done in the premises by the State governments is right, and they shall be protected in carrying it out. But free negroes and slaves may both find themselves outside of any State jurisdiction, and in a Territory where no regulation has yet been made on the subject. There the Constitution is equally impartial. It neither frees the slave nor enslaves the freeman. It requires both to remain *in statu quo*, until the *status* already impressed upon them by the law of their previous domicile shall be changed by some competent local authority. What is competent local authority in a Territory will be elsewhere considered.

3. The Federal Constitution carefully guards the rights of private property against the Federal Government itself, by declaring that it shall not be taken for public use without compensation, nor without due process of law. Slaves are private property, and every man who has taken an oath of fidelity to the Constitution is religiously, morally, and politically bound to regard them as such. Does anybody suppose that a Constitution which acknowledges the sacredness of private property so fully would wantonly destroy that right, not by any words that are found in it, but by mere implication from its general principles? It might as well be asserted that the general principles of the Constitution gave Lane and Montgomery a license to steal horses in the valley of the Osage.

4. The Supreme Court of the United States has decided the question. After solemn argument and careful consideration, that august tribunal has announced its opinion to be, that a slaveholder, by going into a Federal Territory, does not lose the title he had to his negro in the State from which he came. In former times a question of constitutional law once decided by the Supreme Court was regarded as settled by all, except that little band of ribald infidels, who meet periodically at Boston, to blaspheme the religion and plot rebellion against the laws of the country. The leaders of the so-called Republican party have lately been treading close on the heels of their abolition brethren; but it is devoutly to be hoped that Mr. Douglas has no intention to follow their example. In case he is elected President, he must see the laws faithfully executed. Does he think he can keep that oath by fighting the judiciary?

5. The legislative history of the country shows that all the great statesmen of former times entertained the same opinion, and held it so firmly that they did not even think of any other. It was universally taken for granted that a slave remained a slave, and a freeman a freeman, in the new Territories, until a change was made in their condition by some positive enactment. Nobody believed that a slave might not have been taken to and kept in the Northwest Territory, if



the Ordinance of 1787 or some other regulation had not been made to prohibit it. The Missouri restriction of 1820 was imposed solely because it was understood (probably by every member of that Congress) that, in the absence of a restriction, slave property would be as lawful in the eye of the Constitution above 36° 30' as below; and all agreed that the mere absence of a restriction did, in fact, make it lawful below the compromise line.

6. It is right to learn wisdom from our enemies. The Republicans do not point to any express provision of the Constitution, nor to any general principle embraced in it, nor to any established rule of law, which sustains their views. The ablest men among them are driven, by stress of necessity, to hunt for arguments in a code unrevealed, unwritten, and undefined, which they put above the Constitution or the Bible, and call it "higher law." The ultra-abolitionists of New England do not deny that the Constitution is rightly interpreted by the Democrats, as not interfering against slavery in the Territories; but they disdain to obey what they pronounce to be "an agreement with death and a covenant with hell."

7. What did Mr. Douglas mean when he proposed and voted for the Kansas-Nebraska Bill repealing the Missouri restriction? Did he intend to tell Southern men that, notwithstanding the repeal of the prohibition, they were excluded from those Territories as much as ever? Or did he not regard the right of a master to his slave as perfectly good whenever he got rid of the prohibition? Did he, or anybody else at that time, dream that it was necessary to make a positive law in favor of the slaveholder before he could go there with safety?

To ask these questions is to answer them. The Kansas-Nebraska Bill was not meant as a delusion or a snare. It was well understood that the repeal alone of the restriction against slavery would throw the country open to everything which the Constitution recognized as property.

We have thus given what we believe to be the opinions held by the great body of the Democratic party; namely, that the Federal Constitution does not establish slavery anywhere in the Union; that it permits a black man to be either held in servitude or made free, as the local law shall decide; and that, in a Territory where no local law on the subject has been enacted, it keeps both the slave and the free negro in the *status* already impressed upon them, until it shall be changed by competent local authority. We have seen that this is sustained by the reason of the thing, by a great principle of public law, by the words of the Constitution, by a solemn decision of the Supreme Court, by the whole course of our legislation, by the concession of our political opponents, and, finally, by the most important act in the public life of Mr. Douglas himself.

Mr. Douglas imputes another absurdity to his opponents when he

charges them with insisting that "it is the duty of the judiciary to protect and maintain slavery in the Territories, *without any law upon the subject.*" The judge who acts without law acts against law; and surely no sentiment so atrocious as this was ever entertained by any portion of the Democratic party. The right of a master to the services of his slave in a Territory is not against law nor without law, but in full accordance with law. If the law be against it, we are all against it. Has not the emigrant to Nebraska a legal right to the ox-team, which he bought in Ohio, to haul him over the plains? Is not his title as good to it in the Territory as it was in the State where he got it? And what should be said of a judge who tells him that he is not protected, or that he is maintained, in the possession of his property, "*without any law upon the subject*"?

II. We had a right to expect from Mr. Douglas at least a clear and intelligible definition of his own doctrine. We are disappointed. It is hardly possible to conceive anything more difficult to comprehend. We will transcribe it again, and do what can be done to analyze it:

"Those who believe that the Constitution of the United States neither establishes nor prohibits slavery in the States or Territories beyond the power of the people legally to control it, but 'leaves the people thereof perfectly free to form and regulate their domestic institutions in their own way, subject only to the Constitution of the United States.'"

*The Constitution neither establishes nor prohibits slavery in the States or Territories.* If it be meant by this that the Constitution does not, *proprio vigore*, either emancipate any man's slave, or create the condition of slavery and impose it on free negroes, but leaves the question of every black man's *status*, in the Territories as well as in the States, to be determined by the local law, then we admit it, for it is the very same proposition which we have been trying to prove. But if, on the contrary, it is to be understood as an assertion that the Constitution does not permit a master to keep his slave, or a free negro to have his liberty, in all parts of the Union where the local law does not interfere to prevent it, then the error is not only a very grave one, but it is also absurd and self-contradictory.

*The Constitution neither establishes nor prohibits slavery in the States or Territories beyond the power of the people legally to control it.* This is sailing to Point No-Point again. Of course, a subject which is *legally* controlled can not be beyond the power that controls it. But the question is, What constitutes legal control, and when are the people of a State or Territory in a condition to exercise it?

*The Constitution of the United States . . . leaves the people perfectly free, . . . and subject only to the Constitution of the United*



*States.* This carries us round a full circle, and drops us precisely at the place of beginning. That the Constitution leaves everybody subject to the Constitution is most true. We are far from denying it. We never heard it doubted, and expect we never will. But the statement of it proves nothing, defines nothing, and explains nothing. It merely darkens the subject, as words without meaning always do.

But, notwithstanding all this circuitry of expression and consequent opaqueness of meaning in the magazine article of Mr. Douglas, we think we can guess what his opinions are or will be when he comes to reconsider the subject. He will admit (at least he will not undertake to deny) that the *status* of a negro, whether of servitude or freedom, accompanies him wherever he goes, and adheres to him in every part of the Union until he meets some local law which changes it.

It will also be agreed that the people of a State, through their Legislature, and the people of a Territory, in the Constitution which they may frame preparatory to their admission as a State, can regulate and control the condition of the subject black race within their respective jurisdictions, so as to make them bond or free.

But here we come to the point at which opinions diverge. Some insist that no citizen can be deprived of his property in slaves, or in anything else, *except* by the provision of a State Constitution or by the act of a State Legislature; while others contend that an unlimited control over private rights may be exercised by a Territorial Legislature as soon as the earliest settlements are made.

So strong are the sentiments of Mr. Douglas in favor of the latter doctrine, that if it be not established, he threatens us with Mr. Seward's "irrepressible conflict," which shall end only with the universal abolition or the universal dominion of slavery. On the other hand, the President, the Judges of the Supreme Court, nearly all the Democratic members of Congress, the whole of the party South, and a very large majority North, are penetrated with a conviction that no such power is vested in a Territorial Legislature, and that those who desire to confiscate private property of any kind must wait until they get a constitutional convention or the machinery of a State government into their hands. We venture to give the following reasons for believing that Mr. Douglas is in error:

The Supreme Court has decided that a Territorial Legislature has not the power which he claims for it. That alone ought to be sufficient. There can be no law, order, or security for any man's rights, unless the judicial authority of the country be upheld. Mr. Douglas may do what he pleases with political conventions and party platforms, but we trust he will give to the Supreme Court at least that decent respect which none but the most ultra-Republicans have yet withheld.

The right of property is sacred, and the first object of all human

government is to make it secure. Life is always unsafe where property is not fully protected. This is the experience of every people on earth, ancient and modern. To secure private property was a principal object of *Magna Charta*. Charles I afterward attempted to violate it; but the people rose upon him, dragged him to the block, and severed his head from his body. At a still later period another monarch for a kindred offense was driven out of the country, and died a fugitive and an outcast. Our own Revolution was provoked by that slight invasion upon the right of property which consisted in the exaction of a trifling tax. There is no government in the world, however absolute, which would not be disgraced and endangered by wantonly sacrificing private property even to a small extent. For centuries past such outrages have ceased to be committed in times of peace among civilized nations.

Slaves are regarded as property in the Southern States. The people of that section buy and sell, and carry on all their business, provide for their families, and make their wills and divide their inheritance on that assumption. It is manifest to all who know them that no doubts ever cross their minds about the rightfulness of holding such property. They believe they have a direct warrant for it, not only in the examples of the best men that ever lived, but in the precepts of Divine revelation itself; and they are thoroughly satisfied that the relation of master and slave is the only one which can possibly exist there between the white and the black race without ruining both. The people of the North may differ from their fellow-citizens of the South on the whole subject, but knowing, as we all do, that these sentiments are sincerely and honestly entertained, we can not wonder that they feel the most unspeakable indignation when any attempt is made to interfere with their rights. This sentiment results naturally and necessarily from their education and habits of thinking. They can not help it any more than an honest man in the North can avoid abhorring a thief or a housebreaker.

The jurists, legislators, and people of the Northern States have always sacredly respected the right of property in slaves held by their own citizens within their own jurisdiction. It is a remarkable fact, very well worth noticing, that no Northern State ever passed any law to take a negro from his master. All laws for the abolition of slavery have operated only on the unborn descendants of the negro race, and the vested rights of masters have not been disturbed in the North more than in the South.

In every nation under heaven, civilized, semi-barbarous, or savage, where slavery has existed in any form at all analogous to ours, the rights of the masters to the control of their slaves as property have been respected; and on no occasion has any government struck at those rights, except as it would strike at other property. Even the British Parlia-



ment, when it emancipated the West India slaves, though it was legislating for a people three thousand miles away, and not represented, never denied either the legal or the natural right of the slave-owner. Slaves were admitted to be property, and the Government acknowledged it by paying their masters one hundred million dollars for the privilege of setting them free.

Here, then, is a species of property which is of transcendent importance to the material interests of the South—which the people of that region think it right and meritorious in the eyes of God and good men to hold—which is sanctioned by the general sense of all mankind among whom it has existed—which was legal only a short time ago in all the States of the Union, and was then treated as sacred by every one of them—which is guaranteed to the owner as much as any other property is guaranteed by the Constitution; and Mr. Douglas thinks that a Territorial Legislature is competent to take it away. We say no; the supreme legislative power of a sovereign State alone can deprive a man of his property.

This proposition is so plain, so well established, and so universally acknowledged, that any argument in its favor would be a mere waste of words. Mr. Douglas does not deny it, and it did not require the thousandth part of his sagacity to see that it was undeniable. He claims for the Territorial governments the right of confiscating private property on the ground that *those governments ARE sovereign*—have an uncontrollable and independent power over all their internal affairs. That is the point which he thinks is to split the Democracy and impale the nation. But it is so entirely erroneous that it must vanish into thin air as soon as it comes to be examined.

A Territorial government is merely provisional and temporary. It is created by Congress for the necessary preservation of order and the purposes of police. The powers conferred upon it are expressed in the organic act, which is the charter of its existence, and which may be changed or repealed at the pleasure of Congress. In most of those acts the power has been expressly reserved to Congress of revising the Territorial laws, and the power to repeal them exists without such reservation. This was asserted in the case of Kansas by the most distinguished Senators in the Congress of 1856. The President appoints the Governor, judges, and all other officers whose appointment is not otherwise provided for, directly or indirectly, by Congress. Even the expenses of the Territorial government are paid out of the Federal Treasury. The truth is, they have no attribute of sovereignty about them. The essence of sovereignty consists in having no superior. But a Territorial government has a superior in the United States Government, upon whose pleasure it is dependent for its very existence—in whom it lives, and moves, and has its being—who has made, and can unmake it with a breath.



Where does this sovereign authority to deprive men of their property come from? This transcendent power, which even despots are cautious about using, and which a constitutional monarch never exercises—how does it get into a Territorial Legislature? Surely it does not drop from the clouds: it will not be contended that it accompanies the settlers, or exists in the Territory before its organization. Indeed, it is not to the people, but to the government of a Territory, that Mr. Douglas says it belongs. Then Congress must give the power at the same time that it gives the Territorial government. But not a word of the kind is to be found in any organic act that ever was framed. It is thus that Mr. Douglas's argument runs itself out into nothing.

But if Congress *would* pass a statute expressly to give this sort of power to the Territorial governments, they still would not have it; for the Federal Government itself does not possess any control over men's property in the Territories. That such power does not exist in the Federal Government needs no proof; Mr. Douglas admits it fully and freely. It is, besides, established by the solemn decision of Congress, by the assent of the Executive, and by the direct ratification of the people acting in their primary capacity at the polls. In addition to all this, the Supreme Court have deliberately adjudged it to be an unalterable and undeniable rule of constitutional law.

This acknowledgment that Congress has no power, authority, or jurisdiction over the subject, literally *obliges* Mr. Douglas to give up his doctrine, or else to maintain it by asserting that a power which the Federal Government *does not possess* may be *given by Congress to the Territorial government*. The right to abolish African slavery in a Territory is not granted by the Constitution to Congress; it is withheld, and therefore the same as if expressly prohibited. Yet Mr. Douglas declares that Congress may give it to the Territories. Nay; he goes further, and says that the *want* of the power in Congress is the *very reason* why it can delegate it—the general rule, in his opinion, being that Congress can not delegate the powers it possesses, but may delegate such, “and only such as Congress can not exercise under the Constitution!” By turning to pages 520 and 521, the reader will see that this astounding proposition is actually made, not in jest or irony, but solemnly, seriously, and, no doubt, in perfect good faith. On this principle, as Congress can not exercise the power to make an *ex post facto* law, or a law impairing the obligation of contracts, *therefore* it may authorize such laws to be made by the town councils of Washington city, or the levy court of the district. If Congress passes an act to hang a man without trial, it is void, and the judges will not allow it to be executed; but the power to do this prohibited thing can be constitutionally given by Congress to a Territorial Legislature!

We admit that there are certain powers bestowed upon the General



Government which are in their nature judicial or executive. With them Congress can do nothing except to see that they are executed by the proper kind of officers. It is also true that Congress has certain legislative powers which can not be delegated. But Mr. Douglas should have known that he was not talking about powers which belonged to either of these classes, but about a legislative jurisdiction totally forbidden to the Federal Government, and incapable of being delegated, for the simple reason that it does not constitutionally exist.

Will anybody say that such a power ought, as a matter of policy, or for reasons of public safety, to be held by the provisional governments of the Territories? Undoubtedly no true patriot, nor no friend of justice and order, can deliberately reflect on the probable consequences without deprecating them.

This power over property is the one which in all governments has been most carefully guarded, because the temptation to abuse it is always greater than any other. It is there that the subjects of a limited monarchy watch their king with the greatest jealousy. No republic has ever failed to impose strict limitations upon it. All free people know that, if they would remain free, they must compel the government to keep its hands off their private property; and this can be done only by tying them up with careful restrictions. Accordingly, our Federal Constitution declares that "no person shall be deprived of his property except by due process of law," and that "private property shall not be taken for public use without just compensation." It is universally agreed that this applies only to the exercise of the power by the Government of the United States. We are also protected against the State governments by a similar provision in the State Constitutions. Legislative robbery is therefore a crime which can not be committed either by Congress or by any State Legislature, unless it be done in flat rebellion to the fundamental law of the land. But if the Territorial governments have this power, then they have it without any limitation whatsoever, and in all the fullness of absolute despotism. They are omnipotent in regard to all their internal affairs, for they are *sovereigns, without a constitution to hold them in check*. And this omnipotent sovereignty is to be wielded by a few men suddenly drawn together from all parts of America and Europe, unacquainted with one another, and ignorant of their relative rights. But if Mr. Douglas is right, those governments have all the absolute power of the Russian autocrat. They may take every kind of property in mere caprice, or for any purpose of lucre or malice, without process of law, and without providing for compensation. The Legislature of Kansas, sitting at Lecompton or Lawrence, may order the miners to give up every ounce of gold that has been dug at Pike's Peak. If the authorities of Utah should license a band of marauders to despoil the emigrants crossing the Territory, their sovereign right to do so can



not be questioned. A new Territory may be organized, which Southern men think should be devoted to the culture of cotton, while the people of the North are equally certain that grazing alone is the proper business to be carried on there. If one party, by accident, by force, or by fraud, has a majority in the Legislature, the negroes are taken from the planters; and if the other set gains a political victory, it is followed by a statute to plunder the graziers of their cattle. Such things can not be done by the Federal Government, nor by the governments of the States; but, if Mr. Douglas is not mistaken, they can be done by the Territorial governments. Is it not every way better to wait until the new inhabitants know themselves and one another; until the policy of the Territory is settled by some experience; and, above all, until the great powers of a sovereign State are regularly conferred upon them and properly limited, so as to prevent the gross abuses which always accompany unrestricted power in human hands?

There is another consideration which Mr. Douglas should have been the last man to overlook. The present administration of the Federal Government, and the whole Democratic party throughout the country, including Mr. Douglas, thought that, in the case of Kansas, the question of retaining or abolishing slavery should not be determined by any representative body without giving to the whole mass of the people an opportunity of voting on it. Mr. Douglas carried it further, and warmly opposed the Constitution, denying even its validity, because other and undisputed parts of it had not also been submitted to a popular vote. Now he is willing that the whole slavery dispute in any Territory, and all questions that can arise concerning the rights of the people to that or other property, shall be decided at once by a Territorial Legislature, without any submission at all. Popular sovereignty in the last Congress meant the freedom of the people from all the restraints of law and order—now it means a government which shall rule them with a rod of iron. It swings like a pendulum from one side clear over to the other.

Mr. Douglas's opinions on this subject of sovereign Territorial governments are very singular; but the reasons he has produced to support them are infinitely more curious still. For instance, he shows that Jefferson once introduced into the old Congress of the Confederation a *plan* for the government of the Territories, calling them by the name of "New States," but not making them anything like sovereign or independent States; and, though this was not embodied in the Constitution, nor adopted by any subsequent Congress, nor ever afterward referred to by Jefferson himself, yet Mr. Douglas argues upon it as if it had somehow become a part of our fundamental law.

Again: He says that the States gave to the Federal Government the same powers which as colonies they had been willing to concede



to the British Government, and kept those which as colonies they had claimed for themselves. If he will read a common-school history of the Revolution, and then look at Article I, section 8, of the Constitution, he will find the two following facts fully established: 1. That the Federal Government has "power to lay and collect taxes, duties, imports, and excises"; and, 2. That the colonies before the Revolution utterly refused to be taxed by Great Britain; and, so far from conceding the power, fought against it for seven long years.

There is another thing in the article which, if it had not come from a distinguished Senator, and a very upright gentleman, would have been open to some imputation of unfairness. He quotes the President's message, and begins in the middle of a sentence. He professes to give the very words, and makes Mr. Buchanan say that "slavery exists in Kansas by virtue of the Constitution of the United States." What Mr. Buchanan did say was a very different thing. It was this: "It has been solemnly adjudged, by the highest judicial tribunal known to our laws, that slavery exists in Kansas by virtue of the Constitution of the United States." Everybody knows that by treating the Bible in that way you can prove the non-existence of God.

Mr. Douglas has a right to change his opinions whenever he pleases. But we quote him as we would any other authority equally high in favor of truth. We can prove by himself that every proposition he lays down in "Harper's Magazine" is founded in error. Never before has any public man in America so completely revolutionized his political opinions in the course of eighteen months. We do not deny that the change is heart-felt and conscientious. We only insist that he formerly stated his propositions much more clearly, and sustained them with far greater ability and better reasons than he does now.

When he took a tour to the South, at the beginning of last winter, he made a speech at New Orleans, in which he announced to the people there that he and his friends in Illinois *accepted the Dred Scott decision*, regarded *slaves as property*, and fully admitted the right of a Southern man to go into any *Federal Territory* with his slave, and to hold him there *as other property is held*.

In 1849 he voted in the Senate for what was called Walker's amendment, by which it was proposed to put all the internal affairs of California and New Mexico under the domination of the *President*, giving him almost unlimited power, *legislative, judicial, and executive*, over the *internal affairs* of those Territories. Undoubtedly this was a strange way of treating sovereignties. If Mr. Douglas is right now, he was guilty then of a most atrocious usurpation.

Utah is as much a sovereign State as any other Territory, and as perfectly entitled to enjoy the right of self-government. On the 12th of June, 1857, Mr. Douglas made a speech about Utah, at Springfield,

Illinois, in which he expressed his opinion strongly in favor of *the absolute and unconditional repeal* of the organic act, *blotting the Territorial government out of existence*, and putting the people under the sole and exclusive jurisdiction of the United States, *like a fort, arsenal, dock-yard, or magazine*. He does not seem to have had the least idea then that he was proposing to extinguish a sovereignty, or to trample upon the sacred rights of an independent people.

The report which he made to the Senate, in 1856, on the Topeka Constitution, enunciates a very different doctrine from that of the magazine article. It is true that the language is a little cloudy, but no one can understand the following sentences to signify that the Territorial governments have sovereign power to take away the property of the inhabitants :

"The sovereignty of a Territory remains in *abeyance, suspended* in the United States, *in trust for the people until they shall be admitted into the Union as a State*. In the mean time they are admitted to enjoy and exercise all the rights and privileges of self-government, *in subordination to the Constitution of the United States, AND IN OBEDIENCE TO THE ORGANIC LAW* passed by Congress in pursuance of that instrument. These rights and privileges are *all* derived from the Constitution, *through the act of Congress*, and must be exercised and enjoyed in subjection to all the limitations and restrictions which that Constitution imposes."

The letter he addressed to a Philadelphia meeting, in February, 1858, is more explicit, and, barring some anomalous ideas concerning the *abeyance* of the power and the *suspension* of it *in trust*, it is clear enough :

"Under our Territorial system, it requires sovereign power to ordain and establish constitutions and governments. While a Territory may and should enjoy all the rights of self-government, *in obedience to its organic law*, it is NOT A SOVEREIGN POWER. The *sovereignty of a Territory remains in abeyance, suspended* in the United States, *in trust for the people when they become a State*, and *can not be withdrawn from the hands of the trustee and vested in the people of a Territory without the consent of Congress*."

The report which he made in the same month, from the Senate Committee on Territories, is equally distinct, and rather more emphatic against his new doctrine :

"This committee in their report always held that a Territory is not a sovereign; that the sovereignty of a Territory is in abeyance, suspended in the United States, in trust for the people when they become a State; that the States, as trustees, can not be divested of the sovereignty; that no Territory be invested with the right to exercise sovereign power without the consent of Congress. If the people alone can institute government, the power alone can institute government. If a Territory is in abeyance, sus-



pended in the United States, in trust for the people when they become a State, and that the sovereignty can not be divested from the hands of the trustee without the assent of Congress, it follows, as an inevitable consequence, that the Kansas Legislature did not and could not confer upon the Lecompton Convention the sovereign power of ordaining a Constitution for the people of Kansas, in place of the organic act passed by Congress."

The days are passed and gone when Mr. Douglas led the fiery assaults of the opposition in the Lecompton controversy. Then it was his object to prove that a Territorial Legislature, so far from being omnipotent, was powerless even to authorize an election of delegates to consider about their own affairs. It was asserted that a convention chosen under a Territorial law could make and ordain no Constitution which would be legally binding. Then a Territorial government was to be despised and spit upon, even when it invited the people to come forward and vote on a question of the most vital importance to their own interests. But now all things have become new. The Lecompton dispute has "gone glimmering down the dream of things that were," and Mr. Douglas produces another issue, brand-new from the mint. The old opinions are not worth a rush to his present position: it must be sustained by opposite principles and reasoning totally different. The Legislature of Kansas was not sovereign when it authorized a convention of the people to assemble and decide what sort of a Constitution they would have; but when it strikes at their rights of property, it becomes not only a sovereign, but a sovereign without limitation of power. We have no idea that Mr. Douglas is not perfectly sincere, as he was also when he took the other side. The impulses engendered by the heat of controversy have driven him at different times in opposite directions. We do not charge it against him as a crime, but it is true that these views of his, inconsistent as they are with one another, always *happen* to accord with the interests of the opposition, always give to the enemies of the Constitution a certain amount of "aid and comfort," and always add a little to the rancorous and malignant hatred with which the abolitionists regard the Government of their own country.

Yes: the Lecompton issue which Mr. Douglas made upon the Administration two years ago is done, and the principles on which we were then opposed are abandoned. We are no longer required to fight for the lawfulness of a Territorial election held under Territorial authority. But another issue is thrust upon us, to "disturb the harmony and threaten the integrity" of the party. A few words more (perhaps of tedious repetition), by way of showing what that new issue is, or probably will be, and we are done.

We insist that an emigrant going into a Federal Territory retains his title to the property which he took with him, until there is some

prohibition enacted by lawful authority. Mr. Douglas can not deny this in the face of his New Orleans speech, and the overwhelming reasons which support it.

It is an agreed point among all Democrats that Congress can not interfere with the rights of property in the Territories.

It is also acknowledged that the people of a new State, either in their Constitution or in an act of their Legislature, may make the negroes within it free, or hold them in a state of servitude.

But we believe more. We believe in submitting to the law, as decided by the Supreme Court, which declares that a Territorial Legislature can not, any more than Congress, interfere with rights of property in a Territory; that the settlers of a Territory are bound to wait until the sovereign power is conferred upon them, with proper limitations, before they attempt to exercise the most dangerous of all its functions. Mr. Douglas denies this, and there is the new issue.

Why should such an issue be made at such a time? What is there now to excuse any friend of peace for attempting to stir up the bitter waters of strife? There is no actual difficulty about this subject in any Territory. There is no question upon it pending before Congress or the country. We are called upon to make a contest, at once unnecessary and hopeless, with the judicial authority of the nation. We object to it. We will not obey Mr. Douglas when he commands us to assault the Supreme Court of the United States. We believe the court to be right, and Mr. Douglas wrong.

## II.

Another edition of these "Observations" being called for, an opportunity is afforded of adding some thoughts suggested by the attempted reply of Mr. Douglas, and by some criticisms of a different kind which have appeared in other quarters.

Mr. Douglas charges us with entertaining the opinion that "all the States of the Union" may confiscate private property—a doctrine which he denounces as a most "wicked and dangerous heresy." He championizes the inviolability of property, and invokes the fiery indignation of the public upon us for ascribing to the States any power of taking it away. Now, mark how plain a tale will put him down.

There is no such thing and nothing like it on all these pages, from the first to the last. Mr. Douglas was merely flourishing his lance in the empty air. He had no ground for his assertion, except a most unauthorized inference of his own from our denial that the power existed in the Territories. The Territories must wait till they become sovereign States before they can confiscate property; that was our position. Therefore, says the logic of Mr. Douglas, all the States in the Union may do it now. What right had he to make imputations of heresy founded upon mere *inference*, when our opinion *on the very*



*point* was directly expressed in words so plain that mistake was impossible? The following sentences occur on page 12:

"All free people know that, if they would remain free, they must compel the government to keep its hands off their private property; and this can be done only by tying them up with careful restrictions. Accordingly, our Federal Constitution declares that 'no person shall be deprived of his property except by due process of law,' and that 'private property shall not be taken for public use without just compensation.' It is universally agreed that this applies only to the exercise of the power by the Government of the United States. We are also protected against the State governments by a similar provision in the State Constitutions. Legislative robbery is therefore a crime which can not be committed either by Congress or by any State Legislature, unless it be done in flat rebellion to the fundamental law of the land."

The close of the same paragraph shows why it was important that no attempt should be made to exercise such power by a Territory:

"Is it not every way better to wait until the new inhabitants know themselves and one another; until the policy of the Territory is settled by some experience; and, above all, until the great powers of a sovereign State are regularly conferred upon them and properly limited, so as to prevent the gross abuses which always accompany unrestricted power in human hands?"

Mr. Douglas certainly read these passages, for he borrowed a phrase from them, and put it into his own speech. He ought to have understood them. If he both read and understood them, why did he allege that this pamphlet favored the dangerous heresy referred to? Let the charity which "thinketh no evil" find the best excuse for him it can.

That the government of a sovereign State, unrestricted and unchecked by any constitutional prohibition, would have power to confiscate private property, even without compensation to the owner, is a proposition which will scarcely be denied by any one who has mastered the primer of political science. Sovereignty, which is the supreme authority of an independent State or government, is in its nature irresponsible and absolute. It can not be otherwise, since it has no superior by whom it can be called to account. Mere moral abstractions or theoretic principles of natural justice do not limit the legal authority of a sovereign. No government *ought* to violate justice; but any supreme government, whose hands are entirely free, *can* violate it with impunity. For these reasons it is that the Saxon race have been laboring, planning, and fighting, during seven hundred years, for Great Charters, Bills of Rights, and Constitutions, to limit the sovereignty of all the governments they have lived under. Our ancestors in the old country, as well as in America, have wasted their money and blood in

vain to establish constitutional governments, if it be true that a government without a constitution is not capable of doing injustice. They knew better than that. They understood very well that a sovereign government, no matter by whom its power is wielded, may do what wrong it pleases, and "bid its will avouch the deed."

Now, what is the constitutional prohibition which can anywhere be found to restrain "popular sovereignty in the Territories" (if there be such a thing there) from confiscating any citizen's property? There is none. A Territory has no Constitution of its own; and nobody would be absurd enough to say that it is governed by the Constitution of another State. Will it be said that the provision in the Federal Constitution, which forbids the taking of private property without compensation, can be used so as to restrain a Territorial sovereignty? Certainly not. The Supreme Court have decided (in *Baron vs. The City of Baltimore*, 7 Peters, 234) that the clause referred to applies exclusively to the exercise of the power by the Federal Government. The rule was so laid down by Chief-Justice Marshall. It was concurred in by the whole court; and its correctness has never been denied or doubted by any judge, lawyer, or statesman from the time of its decision to this day. If, therefore, there be a sovereignty in the Territories, it is sovereignty unlimited by any constitutional interdict. This implies a power in the Territories infinitely greater than that of any other government in all North America.

The simple and easy solution of all this difficulty is furnished by the Supreme Court, and adopted by the Democratic party as the true principle governing the subject. It is this: That the Territories are not sovereignties, but their governments are public corporations, established by Congress to manage the local affairs of the inhabitants, like the government of a city, established by a State Legislature. Indeed, there is probably no city in the United States whose powers are not larger than those of a Federal Territory. The people of a city elect their own mayor, and, directly or indirectly, appoint all their municipal officers. But the President appoints the Chief Executive of a Territory, as well as the judges. He may send them there from any part of the Union, and, in point of fact, they are generally strangers to the inhabitants when first chosen. They are in no way responsible to the Territory or its people, but to the Federal Government alone, and they may be removed whenever the President thinks proper. The Territorial Legislature is sometimes (and only sometimes) elected by the people; but why? Because Congress has been pleased to permit it by the organic act. The power that gives this privilege could withhold it too. It is always coupled with restrictions and regulations which could never be imposed on a sovereignty by any authority except its own. The organic act generally prescribes the qualifications of voters, and divides the Territory into districts; and



the action of the legislative body itself is controlled by the veto power of a Governor appointed by the President and removable at his pleasure. It is too clear for possible controversy that a Territory is not a sovereign power, but a subordinate dependency. It can not deprive a man of his property without due process of law, or without just compensation, for two reasons : 1. It has no sovereign power of its own ; and, 2. The Federal Government, being forbidden by the Constitution to exercise such power itself, can not bestow it on a Territory. The Constitution of the United States protects a man's property from being plundered by a Territorial Legislature, just as a State Constitution protects it from robbery by the authorities of a city corporation.

It should be noted that, when this question was before the Supreme Court of the United States, there was some difference of opinion among the judges, on the question whether Congress might, or might not, legislate for a Territory in such manner as to take away the right of property in slaves. A majority of two thirds or more held the negative ; and Mr. Douglas admits that the majority was clearly right. But no member of the court expressed the opinion, nor was it even thought of by the counsel, that the Territories had any such inherent and natural power of their own. Indeed, there is no judge of any grade or character, nor any writer on law or government, who has ever asserted or given the least countenance to this *notion of popular or any other kind of sovereignty in the Territories.*

Some trouble will be saved in this part of the argument by the fact that, since the first publication of this pamphlet, Mr. Douglas denies and repudiates all claim of sovereignty for the Territories. He even says that he never did regard them as sovereigns. His words, spoken at Wooster, Ohio, and written out by himself, are these :

*"I NEVER claimed that Territorial governments were sovereign, or that the Territories were sovereign powers."*

Of course this is not to be understood as a mere naked denial that he had previously used those very words. We have no right to charge Mr. Douglas with adopting the exploded system of morality which allows a man to cover up the truth under an *equivogue*. We are bound to take his denial fairly, as meaning that he never thought the Territories had the rights and powers which belong to sovereign governments. Let us see how this assertion will stand the test of investigation.

We do not deny that the article in "Harper's" is extremely difficult to understand. Its unjointed thoughts, loose expression, and illogical reasoning have covered it with shadows, clouds, and darkness. But we will not admit that it has no meaning at all. It is scarcely possible to mistake the general purpose of the author. That purpose undoubtedly was to prove that the States and Territories, so

far as concerns their internal affairs, have political rights and powers which are precisely equal. In fact, he declares, in so many words, that Pennsylvania and Kansas are subordinate to the Constitution "*in the same manner and to the same extent.*" He not only levels the Territories up to the States, but levels the States down to the Territories. If Kansas has slavery by virtue of the Constitution, he insists that, by the same reasoning, Pennsylvania has it too. Now, we know Pennsylvania to be a sovereign; and if Kansas be her equal, then Kansas must necessarily be a sovereign also.

But look at the last sentence, which is the grand summary of his whole doctrine :

"The principle under our political system is, that every distinct political community, loyal to the Constitution and the Union, is entitled to all the rights, privileges, and immunities of self-government, in respect to their local concerns and internal polity, subject only to the Constitution of the United States."

Here the States and Territories are placed on a footing of perfect equality. There is no distinction made between them. If the States are sovereign, so are the Territories. Besides, the "rights, privileges, and immunities," which he describes as pertaining to every distinct political community (that is, to both States and Territories), are sovereign rights, and nothing else. Any community which has the independent and uncontrollable right of self-government, with respect to its local concerns and internal polity, must be, *quoad hoc*, a sovereign.

Again: Mr. Douglas, in his speech at Cincinnati, made so lately as the 9th September last, used the following unmistakable language:

"Examine the bills and search the records, and you will find that the *great principle* which underlies those measures (the Compromise of 1850) is the *right* of the people of *each State and each Territory*, WHILE A TERRITORY, to DECIDE the slavery question for themselves."

Is not this claiming sovereignty for the Territories? Can the slavery question be *decided* without legislating upon the right of property? And can a subordinate government do that? If the Territories have power to decide whether a man shall keep his property or not, where did the power come from? Surely not from Congress, through the organic acts. They must have it, then, upon what Mr. Douglas calls a *great principle*, and that great principle can be nothing else than "sovereignty in the Territories." Thus it is seen that Mr. Douglas makes a tour to the West, and on his way back he contradicts what he said as he went out.

There are but two sides to this controversy: The Territories are either sovereign powers by natural and inherent right, or else they are



political corporations, owing all the authority they possess to the acts of Congress which create them. It is not possible to believe that Mr. Douglas wrote thirty-eight columns in a magazine to prove the truth of the latter doctrine. Nobody but himself and his followers were ever accused of denying it. If he did not deny it, and plant himself upon the opposing ground of *sovereignty in the Territories*, then there was no dispute, or cause of division, between him and the Democratic party; and he has, consequently, been engaged in raising an excitement about nothing; trying to toss the ocean of politics into a tempest, without having even a feather to waft, or a fly to drown.

But that is not all. Mr. Douglas has continually used the *very word sovereignty* with reference to the Territories. This *sovereignty in the Territories* he has asserted and reasserted so often that the phrase is in great danger of becoming ridiculous by the mere frequency with which he repeats it. For many months he has not made a speech or written a letter for the newspapers on any other subject. It heads his elaborate article in "Harper's"; it is vociferated into the public ear from the stump; and it stares at us in great capitals from the handbills which call the people to his meetings. Unless it be acknowledged, he predicts the hopeless division of the party, and even threatens to refuse its nomination for the presidency. Now, all at once, the subject-matter of the whole controversy is admitted to be a nonentity. He "checks his thunder in mid-volley," and owns that there is no sovereignty in a Territory any more than in a British colony. Other persons may have ridden their hobbies as hard as Mr. Douglas; but since the beginning of the world no man ever dismounted so suddenly.

"Sovereignty in the Territories," of which we have heard so much, is generally, if not always, coupled by Mr. Douglas with the prefix of "*popular*." This last word appears to be used for the mere sake of the sound, and without any regard whatever to the sense. It does not mean that the people or inhabitants of the Territories have any supreme power independent of the laws, or above the regularly constituted legal authorities. They can not meet together, count themselves, and say: "We are so many hundreds or so many thousands, and we must therefore be obeyed; the law is in our voice, and not in the rules which our Government has made to control us." Something like this view was vaguely entertained in times when the Lecompton Constitution was opposed. But that is gone by. Mature reflection has left *mobocracy* without a defender. Nobody now insists that the right to make or annul laws and constitutions can be exercised in voluntary mass-meetings or at elections unauthorized by law. Mr. Douglas himself says: "It can *only* be exercised where the inhabitants are *sufficient to constitute a government*, and capable of *performing its various functions and duties*—a fact to be ascertained and determined by Congress." The sovereignty, then, is in the government, if it be

anywhere. But Mr. Douglas now says it is not there ; and he is right. That being the case, where is it ?

When Mr. Douglas, in his speech at Wooster, was repudiating and denying the doctrine of sovereignty in the Territories, and resuming his old position, that they are not sovereign powers, it would have been well to fall back upon something a little more intelligible than his reports to the Senate, or his anti-Lecompton letter to Philadelphia. Here is the way he describes sovereignty in his report of 1856 :

“The sovereignty of a Territory remains *in abeyance, suspended in the United States, in trust* for the people until they shall be admitted into the Union as a State.”

What do these words mean, and in what possible way can they help us to a knowledge of the matter under consideration ? *Abeyance* is good law French, and signifies the peculiar condition of an estate after one tenant has died, and before his successor is competent to take it. But what application can it have, even by analogy, to a sovereignty which never existed ? It seems, too, that this sovereignty is *suspended* in the United States—that is, *hung* or *dependent* from something in the United States, and not *independent* like every other sovereignty under heaven. But the most marvelous part of the business is, that one government which *is* sovereign is represented as a trustee of the sovereignty of another government which is admitted *not* to be sovereign. This is the talk of a man who has too much learning. These technical terms of the common law were invented by English conveyancers and real-property lawyers, for the purpose of expressing the artificial relations which men sometimes bear to lands, tenements, and hereditaments ; but they are wholly inapplicable to such a subject as the sovereignty of a State or nation. We might as well call Territorial sovereignty a contingent remainder, an executory devise, or a special fee tail.

There is some confusion of ideas on another subject. Mr. Douglas and his disciples ascribe to certain Democrats (to the President among others) the belief that the Constitution *establishes* slavery in the Territories ; and, to sustain this accusation, they quote from a message in which the EXISTENCE of slavery in the Territories *by virtue of the Constitution* is asserted on the authority of the Supreme Court. Now, we are in the wrong, if the expression that a thing *exists* by virtue of the Constitution be equivalent to saying that the Constitution has *established* it. There is not only a substantial, but a wide and most obvious difference. The Constitution does not establish Christianity in the Territories ; but Christianity exists there by virtue of the Constitution ; because when a Christian moves into a Territory he can not be prevented from taking his religion along with him ; nor can he



afterward be legally molested for making its principles the rule of his faith and practice.

We have said, and we repeat, that a man does not forfeit his right of property in a slave by migrating with him to a Territory. The title which the owner acquired in the State from whence he came must be respected in his new domicile as it was in the old, until it is legally and constitutionally divested. The proposition is undeniable. But the absurd inference which some persons have drawn from it is not true, that the master also takes with him the judicial *remedies* which were furnished him at the place where his title was acquired. Whether the relation of master and slave exists or not, is a question which must be determined according to the law of the State in which it was created ; but the respective rights and obligations of the parties must be protected and enforced by the law prevailing at the place where they are supposed to be violated. This is also true with respect to rights of every other kind. Two merchants living in the same town may buy their goods in different States. Can it be doubted that the title of each depends on the law of the State where he made his purchase ? But the law of larceny and trespass is the law of a forum common to both, and must necessarily be the same. The validity of a man's marriage is tried by the standard of the law which prevailed in the country where it was solemnized ; but, if he beats his wife, she must seek protection from the law of the place where they live.

Some of Mr. Douglas's partisans, and nearly all of the anti-slavery opposition, contend that property in slaves can not exist so as to entitle it to the protection of the same laws which secure the right of property in other things. For their benefit we shall briefly show how impossible it is to admit the distinction which they insist upon.

What is property ? Whatever a person may legally appropriate to his own exclusive use and transfer to another by sale or gift. By the laws of the Southern States, negroes are within this definition, and the Constitution of the United States not only recognizes the validity of the State laws, but it aids in carrying them out. The framers of the Constitution, seeing that slaves were liable to one danger from which all other property was exempt, namely, that of being seduced away by the offer, in other States, of legal shelter from the pursuit of their owners, agreed that the Federal Government should guarantee their redelivery to the exclusive possession of the persons entitled to them as proprietors. The law, then, of the States in which they are and the Constitution of the Federal Government, to all legal intents and purposes, pronounce that slaves are property. Beaten here, our adversaries convert it from a legal to a theological question. But when they appeal from the Constitution to the Bible, they are equally dissatisfied with the decision they get. Nothing is left them but that "Higher Law," which has no sanction nor no authority, divine or

human. Those who reject the Constitution must be content to follow guides who are stone-blind. They are men who aspire to be wise above what is written, and thereby press themselves down to the extremest point of human folly. They turn their backs on all the light which the world has, or can have; they go forth into outer darkness, and wander perpetually in a howling wilderness of error.

But Mr. Douglas is guiltless of this heresy at least. He concedes that slaves are precisely like other property, so far as regards the legal remedies and constitutional rights of the owner. He professes to take the fundamental law of the land for his guide upon that point. Let his practice, then, correspond with his faith; let him "walk worthy of the vocation wherewith he is called"; let him make no more appeals to popular prejudice for a sovereignty which does not exist; above all things, let him never, by the slightest suggestion, encourage any Territorial government to undermine the rights of the citizen by *legislation* which is "unfriendly" to the security of either property or life. We must not palter with the Constitution in a double sense, but obey it, support it, defend it, earnestly and faithfully, like men who believe in it and love it. Whosoever attempts to trifle with its principles, or weaken the obligation of its guarantees, will find sooner or later that he has fixed a stain upon his political character which "there is not rain enough in the sweet heavens" to wash out.

### III.

As briefly as possible, eschewing all matters personal or *quasi*-personal, and without introduction or preface, I shall notice the only points in Mr. Douglas's last pamphlet that are worthy of attention.

He denies that his views on "Sovereignty in the Territories," as expressed in "Harper's Magazine," are inconsistent with those of the Supreme Court in the Dred Scott case. I aver, on the contrary, that he could not have made such a denial if he had not totally misunderstood either his own opinions or those of the court; for they are in direct conflict with one another. A plain issue of fact is thus made up between us, and it is triable by the record. Let us look at it.

The court, after demonstrating in the clearest manner that the Federal Government had no authority or jurisdiction to abolish slavery in a Territory, proceeded to say what Mr. Douglas himself has quoted on page 530 of the magazine:

"And if Congress itself can not do this—if it is beyond the powers conferred on the Federal Government—it will be admitted, we presume, that *it could not authorize a Territorial government* to exercise them. It could confer no power on any local government established by its authority to violate the provisions of the Constitution."

This is in substance the very identical proposition which Mr. Doug-



las, on page 520, pronounces to be "as plausible as it is *fallacious*." He adds that "the *reverse of it is true as a general rule*"; and then supports his assertion by another assertion the most singular that ever was placed on record by any man having the slightest pretensions to a knowledge of our government; namely, that Congress *could confer* upon a Territory such powers, "and *ONLY* such as Congress *can not exercise* under the Constitution"! There is the record; and I am perfectly sure that no tolerably sensible man in this nation, except Mr. Douglas, will doubt for a moment that it places him and the court in an attitude of perfect antagonism.

But then he says he defended the court in more than *one hundred speeches*. It can scarcely be necessary to say that arguments on a question of law are valued according to their *weight*, and not according to their *number*. The count of Mr. Douglas's speeches on the Illinois stump was, no doubt, faithfully kept; but, when he claims credit for their orthodoxy, he must show something more than scores on a tally-paper. He might as well come, with his "Harper" article in one hand and a two-foot rule in the other, ready to demonstrate his concurrence with the court by showing that it contains two thousand eight hundred and eighty square inches of surface. Without reference to the *superficial* measure of one or the carefully *enumerated* repetitions of the other, we may safely presume that the *quality* of his spoken arguments was not better than that of his written essay; and in this latter Mr. Douglas not only opposes the court, but, what is much worse, he charges it with holding his opinions. This is a deep and serious injury; for how would the judges of that great tribunal be able to look their country in the face, if *they* had ever said that a power over private property, forbidden to the Federal Government, might be delegated by Congress to a Territorial Legislature?

The whole dispute (as far as it is a doctrinal dispute) between Mr. Douglas and the Democratic party lies substantially in these two propositions: 1. The owner of a slave may remove with him, as with other property, into a Territory without forfeiting his title; 2. The government of a Territory has and can have no power to deprive the inhabitants of their private property, whether in slaves or anything else.

I. The "axiomatic principle of public law" that a man, going from one country into another, retains in the latter (if there be no conflicting law) all the rights of property which he had in the former, is so universally acknowledged that nobody thinks worth while to prove it. At all times, in all countries, and by all persons, it is taken and acted upon as a postulate. I certainly had not, until very lately, the remotest suspicion that any man on this side of China would doubt it. All the intercourse between the States, and with foreign countries, depends on it. Without it, the traveler must lose all right to



his trunk whenever he passes the border of his own State ; and, when a foreigner lands among us, he may be robbed of his purse by the first loafer that meets him on the wharf. Importation and exportation would cease, and the commerce of the whole world would suddenly come to a dead pause, if a man might not prove his right to personal property in one country by showing that he was the legal owner of it in another from whence he brought it. This principle is to the commercial world what the law of gravitation is to the material universe ; it can not be abolished without hurling the whole system into ruin.

Mr. Douglas does not admit this "axiomatic principle," nor does he deny it, though he writes a great deal about it. But he is unusually clear and explicit in his assertion that "it has no application to, and does not include, slavery." I insist that he is utterly mistaken. Slaves being recognized as property by the Constitution, and made so by the local laws of those States which have power to regulate their condition, there can be no constitutional or legal reason given for excepting them from the operation of a rule which applies to property in general. Mr. Douglas's argument in favor of such discrimination between slaves and other property is a total failure, and no plausible argument can ever be made on that side, except one founded on the "Higher Law," or the doctrines taught by that new religion, of which Saint Ossawatimie is the apostle and the martyr.

It has never been held that any kind of property can be introduced into a State or Territory whose laws oppose the owner's right ; a liquor-dealer in New York can not take brandy to Portland if the Maine law forbids it. So a relation formed in one country must cease when the parties go to another in which such a relation is illegal : a Turk may be the lawful husband of many wives in Constantinople ; but he can not keep them if he changes his residence to Western Europe or to the American States. So it undoubtedly is with slavery. No man in his senses ever contended that a Virginian, going to live in Pennsylvania, could take his slaves with him, and keep them there in spite of the Pennsylvania law. But if he goes to Kentucky, where the law is not opposed to slavery, it is equally clear that he retains all the dominion over them which he had before his removal. The right of property, no matter where it accrued, continues to be sacred and inviolable until it comes in collision with a law which divests it. In a Federal Territory there can be no such collision with the right of a slaveholder, because there is no conflicting law there on that subject.

All authority, as well as all reason and common sense, is in favor of this doctrine. It was *the very point of the Dred Scott case*. Dred was the slave of Dr. Emerson, in Missouri, and was taken by his master to a Federal Territory, where there was no valid law which either expressly authorized or expressly interdicted the holding of slaves.



The court held that Dred Scott's status in Missouri was not changed nor the right of his master divested by his removal to the Territory. The principle was applied to the case of a slave, just as it would be applied to any other property. It is half a score of times repeated by the judges that there can be no distinction between slave and other property. The other authorities to the same point are conclusive and overwhelming. Any person who desires to see all the learning of the subject may consult "*Cobb on Slavery*," where it is arranged in an order so lucid, and discussed with so much ability, that nothing further need be desired.

There is one other authority directly to the point which I cite, not only for its own intrinsic value, but because it will probably be esteemed very highly by Mr. Douglas himself. It is an extract from a speech of his own, delivered in the Senate on the 23d of February last. The legal equality of slave property and other property was then asserted by him in the following fashion :

"Slaves, according to that decision [the Dred Scott decision], being property, stand on an *equal footing with all other property*. There is just as much obligation on the part of the Territorial Legislature to *protect slaves* as every other species of property—as there is to protect *horses, cattle, dry-goods, liquors, etc.* If they have a right to discriminate as to the one, they have as to the other ; and whether they have got the power of discrimination or not is for the court to decide if any one disputes it. . . . If there is no power of discrimination *on other species of property, there is none as to slaves*. If there is a power of discrimination as to other property—and I think there is—then it applies to slave property. In other words, *slave property is on an equal footing with all other property.*"

In the face of all this, in the teeth of his own words so recently uttered, in defiance of the Supreme Court and all judicial authority, Mr. Douglas now declares that the "axiomatic principle of public law," which enables a man to remove his property from place to place, wherever the local law does not forbid its coming, is not applicable to slaves. To sustain himself in making this distinction, he produces two short passages, both of which have been picked out of one paragraph in Story's "*Conflict of Laws*." These passages (will the reader believe it?) merely show that a slave becomes free when taken to a country *where slavery is not tolerated by law!* Judge Story cites cases decided in England, France, Scotland, and Massachusetts, to prove that the laws of those countries, being opposed to slavery, will dissolve the relation of master and slave when brought in contact with it. I say that slaves may be taken to Kansas or Kentucky without being emancipated. Mr. Douglas, with great gravity and complacency, answers me that I am wrong, because slavery is not tolerated in England or Massachusetts. No instance of a *non sequitur* so glaring and so palpable has ever before fallen under my notice.

Mr. Douglas forbears to burden his pages with "the long list of authorities" which he says are cited by Judge Story. It is a curious fact that not a single one of those authorities touches the question in controversy between us. They all, without exception, refer to cases in which there was a direct conflict between the law of the country where the slave came from and the law of the country to which he was taken. No one of the writers referred to has outraged common sense by saying or hinting that slaves are made free by mere removal without any such conflict of law. The quotation from the opinion of the Supreme Court in *Prigg vs. Pennsylvania* is made with the same rashness and with no nearer approach to the point.

The public will doubtless be somewhat surprised by Mr. Douglas's *unique* mode of dealing with books. For myself, I am inexpressibly amazed at it. I have no right to suppose that he intended to insult the intelligence of his readers, or to impose upon their ignorance, by making a parade of learning and research which he did not possess. But how shall we account for quotations like those? I am obliged to leave the riddle unread.

II. Assuming that slaves taken from a slaveholding State into a Territory continue to be slaves, can the rights of their owners be afterward divested by an act of the Territorial Legislature? They can certainly, if the Territories are sovereign States; if not, not. On this question Mr. Douglas has placed himself in a most peculiar position. Heretofore he has alternately affirmed and denied the sovereignty of the Territories. In his last pamphlet he seems to think the middle way safest; he admits that they are *not sovereign*, but asserts that they have "the *attributes of sovereignty*." This is not at all ingenious. It must be apparent to the dullest understanding that a government which has the attributes of sovereignty is sovereign.

Sovereignty is the supreme authority of an independent State. No government is sovereign which may be controlled by a superior government. As applied to political structures, supremacy and sovereignty are convertible terms. To prove this, I will not refer to "the primer of political science"; it is found in all the *horn-books*. Every half-grown boy in the country who has given the usual amount of study to the English tongue, or who has occasionally looked into a dictionary, knows that the sovereignty of a government consists in its uncontrollable right to exercise the highest power. But Mr. Douglas tries to clothe the Territories with the "attributes of sovereignty," not by proving the supremacy of their jurisdiction in any matter or thing whatsoever, but merely by showing that they may be, and some of them have been, authorized to *legislate* within certain limits, to exercise the right of *eminent domain*, to lay and collect *taxes* for Territorial purposes, to deprive a citizen of *life, liberty, or property* as a punishment for crime, and to *create corporations*. All this is true



enough, but it does by no means follow that the provisional government of a Territory is, therefore, a sovereign in any sense of the word. A city council may legislate, but the city is still subordinate to the State which gave it political being. The right of eminent domain is delegated every day to private corporations, but no turnpike company pretends to be a sovereign State. The courts in many places have authority to create corporations, the sheriff of a county has power to imprison or hang malefactors, and the supervisors of a township can levy taxes ; but I think no judge, sheriff, or supervisor has ever claimed the purple or the diadem on any such ground. Governments always act by their agents, but the agent, whether it be an individual officer or a political corporation, like a city or a Territory, is not in any case sovereign, supreme, and uncontrollable. Thus, the arguments of Mr. Douglas, which he elaborates through page after page with wearisome pains, are but touched with the finger of investigation, and they disappear forever :

"The earth hath bubbles, as the water has,  
And these are of them."

Mr. Douglas, the Senator, the statesman, the struggling candidate for the presidency, should not have borrowed from the lawyerlings and small wits of the Abolition party the stale, often-repeated, and worn-out assertion that emigrants can not have a right to the property they take with them, because it will introduce into the Territory or State where they settle all the conflicting laws of the different States from whence they came. Nothing could be less worthy of his high place in the councils of the nation. He ought to know that goods of various kinds are going continually into each State from all the other States of the Union, without producing any such effects. He *does* know that nearly all the personal property within the limits of a new Territory has come there from abroad under the protection of the axiomatic principle which he thinks proper to sneer at ; and he never heard that any difficulty or confusion was produced by it.

I never said that an immigrant to a Territory had a right to his property *without a remedy* ; but I admit that he must look for his remedy to the law of his new domicile. It is true that he takes his life, his limbs, his reputation, and his property, and with them he takes nothing but his naked right to keep them and enjoy them. He leaves the judicial remedies of his previous domicile behind him. It is also true that, in a Territory just beginning to be settled, he may need remedies for the vindication of his rights above all things else. In his new home there may be bands of base marauders, without conscience or the fear of God before their eyes, who are ready to rob and murder, and spare nothing that man or woman holds dear. In such a time it is quite possible to imagine an abolition Legislature whose members owe their seats to Sharp's rifles and the money of the Emi-

gration Aid Society. Very possibly a Legislature so chosen might employ itself in passing laws *unfriendly* to the rights of honest men, and *friendly* to the business of the robber and the murderer. I concede this, and Mr. Douglas is entitled to all the comfort it affords him. But it is an insult to the American people to suppose that any community can be organized within the limits of our Union who will tolerate such a state of things. If it shall ever come to that, Mr. Douglas may rest assured that a remedy will be found. No government can possibly exist which will allow the right of property to go unprotected; much less can it suffer such a right to be exposed to "unfriendly legislation."

Mr. Douglas thinks that a Territory may exclude slaves, or interfere with the rights of the owners, because, in some of the organic acts, the general grant is made of authority over "all rightful subjects of legislation." This is not the least unaccountable of his strange notions. In such an act nothing is taken by implication, nor could the power in question be given even by express words, for it is forbidden by the Constitution to the Federal Government itself. The logic so peculiar to Mr. Douglas, which infers the power to give from the want of possession, may sustain such a construction of a statute; but nothing else will.

A "plan" relating to the Territories was offered to Congress by Mr. Jefferson in 1784. It was a mere *projet*, in the form of resolutions, embodying certain abstract propositions in anticipation of settlements yet to be made in the wilderness. It did not establish any government, temporary or permanent, but provided how the settlers, when they would go there, might petition Congress and get themselves organized. There is not a word in any of the resolutions about sovereignty or slavery. They were passed in April, 1784, but three years afterward they were repealed; the whole "plan" was rejected by Congress, and another plan totally different (the famous Ordinance of 1787) was substituted in its place. Mr. Douglas, in "Harper," referred to this plan, and expended column after column of dreary comment upon it. It was ridiculously inapplicable to his argument; like his quotation from Story, it had no more to do with the subject before him than the Edict of Nantes. I referred to it merely as showing how he could wander from the point. But he allows his righteous soul to be vexed at me for saying it was rejected. It was rejected; for, though Congress assented to the resolutions when first offered, the plan was repudiated before a single principle of it went into operation. Mr. Douglas says that it "stood on the statute-book unrepealed and irrepalable." I take it for granted that he would not have made such an allegation if he had known what I now tell him: that it was, in fact, repealed in 1787 by the unanimous vote of the whole Congress.—(Journal of Congress, vol. iv, page 754.)



I have regarded this dispute as on a question of constitutional law, far, very far, above party politics. But I am tempted to vindicate the Democracy from the imputation which Mr. Douglas casts upon that party when he claims the Cincinnati platform as favoring his creed. It contains no word of the kind. I may also add that every Democrat who desires to preserve "the unity of the faith in the bonds of peace" will disapprove the odious charge which Mr. Douglas flings at the President, of agreeing with him on this subject. The calm, clear judgment of Mr. Buchanan was never for a moment imposed on, nor his love for the Constitution shaken, by this heresy. Neither in his Sanford letter, nor in his letter of acceptance, nor his inaugural address, nor in any other paper, public or private, did he ever give the remotest countenance to such doctrine. He has often said that the people of the Territories had the right to determine the question of slavery for themselves, but he never said nor intimated that they could do so before they were ready to form a State Constitution.

I will not follow Mr. Douglas any further at present. But I must not be understood as assenting to the numerous assertions upon which I am silent. There is scarcely a sentence in this whole pamphlet which does not either propound an error, or else mangle a truth. I do not charge him, however, with willful misstatements of either law or fact.

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#### LETTER TO JUDGE HOAR.

WASHINGTON, *January 18, 1870.*

SIR : I was not present in court yesterday to hear your remarks on Mr. Stanton, but to-day I was shown a newspaper report of them, which I presume to be perfectly accurate. The following paragraph struck me with much surprise :

"But it is not of the lawyer, eminent as he was in the science and practice of the law, that men chiefly think as they remember him. His service to mankind was on a higher and wider field. He was appointed Attorney-General by Mr. Buchanan on the 20th of December, 1860, in one of the darkest hours of the country's history, when the Union seemed crumbling to pieces without an arm raised for its support, when 'without' the public councils 'was doubting, and within were fears'; when feebleness and treachery were uniting to yield whatever defiant rebellion might demand, and good men everywhere were ready to despair of the republic. For ten weeks of that winter of national agony and shame, with patriotism that never wavered, and courage that never quailed, this true American, happily not wholly alone, stood manfully at his post, 'between the living and the dead,'

gave what nerve he could to timid and trembling imbecility, and met the secret plotters of their country's ruin with an undaunted front, until before that resolute presence the demons of treason and civil discord appeared in their own shape, as at the touch of Ithuriel's spear, and fled baffled and howling away."

This statement was carefully and deliberately written down before you delivered it. You spoke for the American bar as its organ and official head, and you addressed the highest judicial tribunal in the world, knowing that your words were to go upon its record and remain there forever. I take it for granted that under these circumstances no earthly temptation could make you deflect a hair's breadth from the facts as you understood and believed them. The inevitable conclusion is that you must have in your possession, or within your reach, some evidence which convinces you that what you said is the truth, and nothing but the truth. I am sure you will excuse me for asking you to say what that evidence is.

The passage I have transcribed from your address sounds like the authoritative summary of an historian as he closes the most interesting chapter of his book. You can hardly consider the curiosity impertinent that prompts an American citizen to inquire what your judgment is founded upon. Besides, I have some friends whose reputation is deeply involved in the affairs you pronounce upon with so much confidence. Moreover, I have a personal concern in your remarks, for I was one of Mr. Stanton's colleagues, and am as liable as any of them to be taken, on your statement, for one of the "secret plotters of their country's ruin." Be pleased, therefore, to give me the information I seek.

Do you find on the records of your office anything which shows that Mr. Stanton was in violent or dangerous conflict with "demons of treason and civil discord," or any other description of demons?

Did Mr. Stanton himself ever lay claim to the heroic character you ascribe to him, or declare that he had performed those prodigious feats of courage while he was in Mr. Buchanan's Cabinet?

Has any other person who was in a condition to know the facts ever given you that version of them which you repeated to the court? If yes, who are the witnesses?

What particular danger was he exposed to which tested his valor, and made his "undaunted front" a thing so wonderful in the description of it?

Whose "feebleness and treachery" was it that united "to yield whatever defiant rebellion might demand"? And how did Mr. Stanton's courage and patriotism dissolve the combination, or defeat its purposes?

You say that for ten weeks "he stood manfully at his post between the living and the dead." Now, when the first law officer of



the United States addresses the Supreme Court on a special occasion, and after elaborate preparation, he is presumed to mean something by what he says. How is this to be understood? You certainly did not intend to assert merely that he stuck to his commission as long as he could, and gave it up only when he could not help it. Standing *manfully* at a post of any kind, and especially when the stand is made between the *living* and the *dead*, has doubtless a deep significance, if one could but manage to find out what it is. Who were the dead and who were the living? And how did it happen that Mr. Stanton got between them? What business had he between them, and why did he stay there for ten weeks? These questions you can easily answer, and the answer is needed, for in the mean time the conjectural interpretations are very various, and some of them injurious to the dead and living aforesaid, as well as to Mr. Stanton, who, according to your representation, stood between them.

I can comprehend the well-worn simile of Ithuriel's spear, but I do not see what on earth was the use of it, unless you thought it ornamental and original; for you make Mr. Stanton by his mere presence, without a spear, do what Ithuriel himself could not do with the aid of that powerful instrument. The angel with a spear compelled a demon to lay aside his disguise, while the mortal man dealt with many demons, and not only made them all appear in their proper shape, but drove them "baffled and howling away" out of his "resolute presence." I do not object to this because the figures are mixed, or because it is an extravagant outrage on good taste. The custom of the time allows men who make eulogies on their political friends to tear their rhetoric into rags; and if you like the tatters, you are welcome to flaunt them; but I call your attention to it in the hope that you will talk like a man of this world, and give us in plain (or at least intelligible) prose, a particular account of the very important transactions to which you refer, together with the attendant circumstances. I suppose you have no thought of being taken literally. Your description of Mr. Stanton conjuring demons is only a metaphorical way you have of saying that he frightened certain bad men. I beg you to tell me who they were, and how he scared them.

I repeat that you are not charged, and, in my opinion, could not be justly charged, with the great sin of fabricating statements like these. You have no doubt seen or heard what you regard as sufficient proof of them. What I fear is, that you have been misled by the false accounts which partisan writers have invented, not to honor Mr. Stanton, but to slander others.

If you had known the truth concerning his conduct while he was Attorney-General, and told it simply, you might have done great honor to his memory. He was, at that time, a regular-built, old-fashioned, Democratic "Union-saver." He believed in the Constitu-

tion as the fundamental law of the land ; as the bulwark of public liberty ; and as the only bond by which the States could be rightfully held together. He regarded his official oath as a solemn covenant with God and his country, never to be violated under any circumstances, and he had a right wholesome contempt for that corrupt code of morality which teaches that oaths are not binding upon the rulers of a free country, when they find it inconsistent with their interest to keep them. He uniformly behaved with "modest stillness and humility," except when his opinion was asked, and then he spoke with becoming deference to others. From that part of his life, at least, you might, by telling it truly, have derived a "lofty lesson" indeed. But this quiet, unpretending, high-principled Democratic gentleman is converted by your maladroit oratory into a hectoring bully of the abolition school ; rampaging through the White House and around the department, trying to frighten people with big looks.

I beseech you to examine your authorities. If you still think them sufficient to sustain you, I can not doubt your willingness to communicate them for the scrutiny of others who are interested. If, on the contrary, you shall be satisfied that you have made a great mistake, then justice to all parties, and especially to the subject of your well-meant but unfortunate eulogy, requires some amends to be made. It will be for you to say whether you will, or will not, ask the court for leave to withdraw that part of your speech from the record.

I am, very respectfully, yours,  
J. S. BLACK.

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#### LETTERS TO HENRY WILSON.

##### I.

*To the Hon. Henry Wilson, Senator from Massachusetts :*

IN the February number of the "Atlantic Monthly" appeared an article of yours entitled "Edwin M. Stanton." It contains some statements which are very wonderful, if true ; and, if false, they ought to be corrected. I ask you to review this production in the light of certain facts which I shall now take the liberty to mention.

My principal object is to satisfy you that you have wholly misunderstood the character of Mr. Stanton, and grossly injured him by what you supposed to be panegyric. But before I begin that, suffer me to correct some of your errors about other persons.

In your vituperative description of the Buchanan Administration, you allege that "the President and his Attorney-General surrendered the Government's right of self-preservation" and "pronounced against



its power to coerce a seceding State." You refer manifestly to the opinion of the Attorney-General, dated the 20th of November, 1860, defining the duties and powers of the President, and to the public acts of the President which show that he took the advice of the law department and squared his conduct accordingly. Upon this ground mainly, if not entirely, you denounce that Administration as not only weak and unpatriotic, but willfully wicked and treasonable. I propose to show that you have committed a cardinal error, if not something worse. The coarse way in which you charge the dead as well as the living with the highest crimes would justify a reply in language much plainer than I intend to use.

Your modes of thinking and speaking on subjects of this kind are so loose and inaccurate, that it is necessary to furnish you with an idea of certain elementary principles which to most other men are too familiar to talk about:

1. The *Government* of the United States is the *Constitution* and *laws*.

2. The *preservation* of the Government consists in *maintaining* the supremacy of the Constitution and laws.

3. For this purpose certain *coercive* powers are delegated to the Executive, which he may use to defend the laws when they are resisted.

4. But in this country, as in every other, except where the government is an absolute despotism, the authority of the Chief Magistrate is *limited* and his hands are tied up by legal restriction, to prevent him from using physical force against the life, liberty, and property of his fellow-citizens, unless in certain prescribed ways and on proper occasions.

5. He is bound by his inaugural oath to keep within those limits: if he *breaks* the laws, he *destroys* the Government; he can not stab the Constitution in the back because he is afraid that somebody else will strike it in the face.

6. The Government of the United States, within its proper sphere, is a *sovereign*, as much as the States are sovereign within their sphere. It acts *immediately* upon the people, and claims their *direct* obedience to its laws. As a State can not make war upon a city, county, or town, and put all its inhabitants to the sword, because some of them have acted or threatened to act illegally, so the General Government is also restrained from exterminating the whole population of a State for the offenses, actual or intended, of some who live among them.

7. The so-called ordinances of secession in 1860-'61 were the declarations of certain persons who made them that they *intended to disobey* the laws of the United States. It was the duty of Congress and the President to see that forcible resistance to the laws, when actually

made, should be met by a counter-force sufficient to put it down ; but neither Congress nor the President had authority to declare war and begin hostilities, by anticipation, against all the people at once, and put them all in the attitude of public enemies without regard to their personal guilt or innocence.

The opinion of the Attorney-General, which you have garbled, and the messages of President Buchanan, assert these principles in plain English words. We held that the whole coercive power of the United States, delegated by the Constitution to every branch of the Government, judicial, legislative, and executive, including its military and naval force, might and ought, in the appointed way, to be used to maintain the supremacy of the laws against all opposers, to hold or retake the public property and to collect the revenue. But we asserted, also, that powers not given ought not to be usurped, and that war upon a State, in the then circumstances of the country, would be not only usurpation, but destruction of the Union.

Of course, you can not be so ignorant of the fundamental law as not to know that our exposition of it was perfectly sound and correct. You never pretended—no man with sense enough to know his right hand from his left ever will pretend—that the President had constitutional or legal authority to make an aggressive war against the States by his own act, nor had Congress any such power. But you think I ought not to have answered the President's questions truly, and that he ought not to have been influenced by constitutional scruples. That is the rub. There is no dispute—never was, and never can be—about the law ; but Mr. Buchanan's wickedness and treason consisted in obeying it when you think he ought to have broken it. For this cause you try to excite against his memory those bad party passions by which he was hounded and persecuted during all the last years of his life.

I will make no effort to convince you that Mr. Buchanan was right in standing by the Constitution which he had sworn to preserve, protect, and defend. That I know would be altogether hopeless. The declared admirer of John Brown, the political ally of Jim Lane, the partisan of Baker, the advocate of general kidnapping and special murder by military commissions, the open supporter of measures which abolish the right of trial by jury and build up an Asiatic despotism on the ruins of free government—such a man would entirely misunderstand the reason (simple as it is) upon which I put the justification of a dead President for refusing to perjure himself. But, if I can not *justify*, perhaps I can *excuse* him. I will offer some apologies which may possibly disarm your censure, or at least mitigate the severity of your righteous indignation.

In the first place, Mr. Buchanan was born of Christian parents and educated in a Christian community. All his lifetime, and at the mo-



ment of his death, he felt that fear of God which a respectable authority has declared to be, not weakness, but the "beginning of wisdom" and the only source of true greatness. The corruptions introduced into the Church by the political preachers of New England never reached him. He was simply a Christian man, and a firm believer in the morality taught by the New Testament. Now, you know (at all events you must have heard) that persons who adhere to that kind of religion always contract a habit of regarding the violation of an oath with inexpressible horror, whether it be committed by an officer or a witness; whether the object of it be to destroy the character of a political opponent, to promote the interests of a party, or to enslave a State. All kinds of false swearing are alike to them. They stubbornly reject the reasoning which seeks to convince them that observance of oaths by magistrates and legislators is a mere question of expediency and self-interest, varying with circumstances. Mr. Buchanan being a man of this class, I submit the question whether his prejudices against perjury (unreasonable as you may think them) are not entitled to some little respect.

Apart from the religious obligation of his oath, he loved the Constitution of his country on its own account, as the best government the world ever saw. I do not expect you to sympathize with this feeling; your affections are otherwise engaged. But can you not make allowance for his attachment to that great compact which was framed by our forefathers to secure union, justice, peace, State independence, and individual liberty for ourselves and our posterity?

Another thing: All his predecessors governed their conduct by similar notions of fidelity to the Constitution. In peace and in war, in prosperity and disaster, through all changes, in spite of all threats and provocations, they had kept their oaths, and assumed no ungranted power. It was the most natural thing in the world for Mr. Buchanan to follow the example of such men as Washington, Madison, and Jackson, rather than the precepts of those small but ferocious politicians who thought their own passions and interests a "higher law" than the law of the country.

Again: All his advisers—not I alone, but *all* of them—expressed the clear and unhesitating opinion that his view of the law on the subject of coercing States was right. His legal duty being settled, not one among them ever breathed a suggestion that he ought to violate it.

Besides: there was a question of natural justice, as well as legal propriety, involved in making war upon the States at that time. Nine-tenths of the Southern people were thoroughly devoted to the Union, and had committed no sin against it, even in thought. Would it have been well to bring the visitation of fire, sword, and famine upon whole communities of innocent persons? You will probably answer this in the affirmative. You think that no opportunity to

shed blood and plunder the property of men, women, and children who live beyond the Potomac ought ever to be lost. Mr. Buchanan might have seized that occasion to imitate John Brown on a large scale, and thus made himself an "heroic character" in your eyes. But you must be aware that he would have been regarded by the mass of men as a moral monster; and the admiration of yourself and your party in Massachusetts would have been but a poor compensation for the eternal weight of infamy with which the rest of the world would have loaded his memory.

Further still: You know that the General-in-Chief of the Army had reported five companies as the whole available force for operations in the South, and you never proposed to increase it. Yet you wanted war. Why? You must have desired the Union cause to be disgraced and defeated, for nothing else could have resulted from such a war as you now abuse Mr. Buchanan for not making. You and your party in Congress were strictly non-committal. You did not recommend peace, nor offer your support to war. You would take neither the olive-branch nor the sword. You refused to settle, and you made no preparation for a contest. But you reveal now what was then the secret desire of your heart—that the Administration, in defiance of law and without means, would declare war on its own responsibility. This would have been an expulsion of the Southern States from the Union, for it would have placed all their people beyond the protection of Federal law; they would necessarily rise in self-defense; our little army of five hundred men would perish in a fortnight; and before the 4th of March the independence of the South would be a settled fact.

Moreover, as you and your party friends in Congress did not call for a war, the President had a right (had he not?) to suppose that you approved of his determination to keep the peace. Perhaps your approval of his conduct is not very powerful evidence of its justice or legality. But here is the point: How can you have the face to denounce a man as a criminal, after he is dead, for public acts which you consented to by your silence at the time they were done?

But this is not all. You give your unqualified approbation to Mr. Lincoln's Administration. I do not say you were true to it (for I believe the evidence is extant which proves that you were not); but you have lauded it as strong and faithful. Mr. Lincoln adopted precisely the same legal principles with regard to the coercion of the States that Mr. Buchanan had acted upon, and carried the policy of reconciliation infinitely beyond him. He avowed his intention not to make war or provoke it as plainly as his predecessor had ever done. Neither he nor his Attorney-General asserted their constitutional authority to commence aggressive and general hostilities for any cause then existing. He received commissioners from the Southern States.



He pledged himself not to retake the forts, arsenals, dock-yards, custom-houses, etc., then in the hands of the secessionists. He promised to continue the mail service in the seceded States if they would permit him. He went further still, and publicly assured the Southern people that he would not irritate them by attempting to execute the Federal laws at any place where it would be specially offensive to them. All these were concessions to the South which Mr. Buchanan had steadily refused to make; and if he had made them, you would no doubt have pronounced them treasonable. But the Lincoln Administration did not stop here. That Cabinet voted six to one *in favor of surrendering* Fort Sumter—Mr. Blair being the only dissident. The President, if he did not yield to the majority, must have wavered a considerable time; the Secretary of State was so sure of him, that he caused the South Carolina authorities to be informed that the *fort would be given up*. You will not deny these facts, but you will continue, as heretofore, to say that the Buchanan Administration weakly and wickedly favored secession, while that of Lincoln was firmly and faithfully opposed. The man who involves himself in such inconsistencies, whether from want of information, want of judgment, or want of veracity, is not qualified to write on an historical subject.

I have given more time and space than I intended to this part of your paper. But I am addressing a man of peculiar character. To a person whose moral perceptions are healthy and natural, I could make my defense in a breath. But being required to apologize for *not* violating a sworn duty, some circumlocution is necessary.

Your mere railing accusations against Mr. Buchanan are hardly worth a reply. The place he is destined to occupy in history does not depend on anything you can say or forbear to say. You have no knowledge whatever of his character. Morally, intellectually, and politically, he was altogether too much of a man for you to comprehend. The world will look for its information concerning him to the acts of his life, and to the testimony of men who knew him and had minds large enough to take his dimensions. I would not offer you the word of a Democrat; but among those who were with him continually during the last weeks of his Administration are some who have since supported radical measures with a zeal warm enough to make them good witnesses. Let General Dix speak his knowledge and say whether he saw anything of the treason, the weakness, or the wickedness which you impute so boldly and so recklessly. Mr. King, the Postmaster-General, can not be ignorant of any important fact which bears on this question. Mr. Holt has already, on several occasions, delivered his testimony. It is a fervent tribute to the "wise statesmanship and unsullied patriotism" of Mr. Buchanan, as well as to "the firm and generous support" which he constantly gave to men and measures approved by his conscience. The proofs of his great ability



and his eminent public services are found on every page of his country's history from 1820 to 1861. During all that long period he steadily, faithfully, and powerfully sustained the principles of free constitutional government. This nation never had a truer friend, nor its laws a defender who would more cheerfully have given his life to save them from violation. No man was ever slandered so brutally. His life's life was literally lied away. In the last months of his administration he devoted all the energies of his mind and body to the great duty of saving the Union, if possible, from dissolution and civil war. He knew all the dangers to which it was exposed, and it would, therefore, be vain to say that he was not alarmed for his country; but he showed no sign of unmanly fear on his own account. He met all his vast responsibilities as fairly as any Chief Magistrate we ever had. In no case did he shrink from or attempt to evade them. The accusation of timidity and indecision is most preposterous. His faults were all of another kind; his resolutions once formed were generally immovable to a degree that bordered on obstinacy. On every matter of great importance he deliberated cautiously, and sometimes tried the patience of his friends by refusing to act until he had made up an opinion which he could live and die by. These characteristics explain the fact that his whole political life, from the time he entered Congress until he retired from the presidency—all his acts, speeches, and papers—have a consistency which belongs to those of no other American statesman. He never found it necessary to cross his own path or go back upon his pledges. His judgment was of course not infallible; and in 1861 he announced a determination with reference to the South Carolina commissioners which I and others thought erroneous but unchangeable. Most unexpectedly, and altogether contrary to his usual habit of steadfast self-reliance, he consented to reconsider and materially alter his decision. This change, and all the circumstances which brought it about, were alike honorable to his understanding and his heart. I admit that you were not the first inventor of these slanders; but you ought to know that it does not become a man in your station to take up an evil report and repeat it, like a parrot, without stopping to consider whether it has any foundation or not.

You are not content with traducing Mr. Buchanan himself; you take up the heads of departments who served under him, and deal out your denunciations upon nearly all in succession.

The Secretary of the Treasury, you say, was deranging the finances and sinking the national credit. Upon whom does this fall? Was it Cobb, or Thomas, or Dix that committed that crime? The charge is equally untrue whether made against one or another. You never saw a scintilla of evidence to justify it.

You tell your readers that the Secretary of War *scattered the army*



and *sent guns* and munitions to the secessionists. Whatever Mr. Floyd may have done in his lifetime, it is well established that he never did this. Numerous charges have been, and others might be, made against that officer with some show of truth. It is curious that your appetite for scandal could be satisfied only by selecting one which is well known to be unfounded.

You inform the country that the Secretary of the Navy *rendered that arm powerless*. This is not a new charge. It has been made several times before, and solemnly investigated more than once. Not only has it never been supported, but it has uniformly been met by such evidence of Mr. Toucey's perfect integrity that every respectable man among his political enemies acquits him without hesitation. In your present reiteration of it, you are simply bearing false witness against your neighbor, in flat violation of the ninth commandment.

But perhaps the most extraordinary of all your averments is, that the Secretary of the Interior *permitted the robbery of trust funds*. You did not mean it to be understood that a robbery occurred which he knew nothing about, and of which he was, therefore, as innocent as any other man. You intended to make the impression that he willfully gave his permission to the criminal asportation of the funds in question, made himself an accessory to the felony before the fact, and was as guilty as if he had done it with his own hands. You could not possibly have believed this, unless you perversely closed your eyes against the light of plain truth. All the circumstances of the transaction to which you refer are as well understood as anything in the history of the country. A committee of Congress, consisting of members opposed to the Secretary, examined the evidence when it was fresh, and reported upon it. The correctness of their judgment has never been impugned. In the face of these recorded and well-known facts, you deliberately sit down and write out, or get somebody to write and publish to the world on your authority, the accusation that Mr. Thompson has committed an offense which should make him infamous forever. The force of medacity can go no further. I admit that you are a *loyal* man, in the modern sense of the word, and a Senator in Congress from a most loyal State; and it is equally true that Mr. Thompson was a rebel; that he was for years an exile from his home and country, pursued wherever he went by an Executive proclamation which put a price on his head. This gives you an immense advantage over him. But the fact is still true that no department of this Government was ever managed more ably or more faithfully than the Interior while he was at the head of it. You may have all the benefit of loyalty, and you may weigh him down with the huge burden of rebellion; nevertheless, his mental ability, good sense, and common honesty put him so immeasurably far above you, that you will never in this life be able to get a horizontal view of his character.



I come now to the more important part of your article, which directly concerns Mr. Stanton. Your attacks upon Buchanan, Toucey, and Thompson might be safely passed in silence, but the character of Stanton must utterly perish if it be not defended against your praise.

You give us the first information we ever had that Mr. Stanton, though acting with the Democratic party, was an abolitionist at heart almost from his earliest youth. For this fact you vouch his declaration to Judge Chase more than thirty years ago, at Columbus, Ohio ; and you attempt to corroborate it by citing his association at Washington with Dr. Bailey and other abolitionists. If you tell the truth, he was the most marvelous impostor that ever lived or died. Among us, his political principles were thought to be as well known as his name and occupation. He never allowed his fidelity to be doubted for one moment. It was perfectly understood that he had no affinities whatever with men of your school in morals or politics. His condemnation of the abolitionists was unsparing for their hypocrisy, their corruption, their enmity to the Constitution, and their lawless disregard for the rights of States and individuals. Thus he won the confidence of Democrats. On the faith of such professions we promoted him in his business, and gave him office, honor, and fortune. But, according to your account, he was all the while waiting and hoping for the time to come when he could betray the Constitution and its friends into the cruel clutches of their enemies. For this cold-blooded and deliberate treachery you bespeak the admiration of the American people. You might as well propose to canonize Judas Iscariot.

I maintain, on the other hand, that he was what he seemed to be, a sound and sincere friend, political and personal, of the men who showered their favors on his head. He had at least the average amount of attachment for "the Constitution of the United States, and for the peace, good order, and happiness of the same." As a necessary consequence, he dreaded the dishonest and destructive rule which he foresaw that you would be sure to establish as soon as you could. His democracy did not cease when the war opened. In the summer of 1861, when your anti-constitutional principles began to be practically carried out by the kidnapping of innocent citizens, by the suppression of free speech, and by the enslavement of the press, he imprecated the vengeance of God and the law upon the guilty authors of those crimes with as much energy as any Democrat in the nation. Only a short time before his appointment as Secretary of War his love of liberty and legal justice impelled him to curse Mr. Lincoln himself with bitter curses. He called him by contemptuous names, and with *simian* if not with "swinish phrase soiled his addition." I admit that he changed these sentiments afterward, but I deny that he had adopted your way of thinking while he pretended to concur in ours. His conversion was a real one, produced by what he regarded as "good



and sufficient reasons him thereunto moving," and it was accompanied, or immediately followed, by a corresponding change of his party attitude. He was not what you make him out, a mere fawning hypocrite.

The issue is plainly made. The friends of Mr. Stanton will not permit you to gibbet him in the face of the world, after death has disarmed him of the power of self-defense. You must prove the injurious allegations you make, or else accept the just consequences. If the Chief-Justice will say that he knows Mr. Stanton to have been "in entire agreement" with the Abolition party thirty years ago, his testimony may silence denial. But you must not trifle with us; we will hold you to strict proof; hearsay evidence will not be received; least of all will the fact be admitted upon the second-hand statement of a person who thinks, as you manifestly do think, that deception, fraud, and false pretenses are an honor to the man who practiced them.

Next in chronological order is your assertion that Mr. Stanton, while yet a private citizen, advised Mr. Buchanan that it was the duty and the right of the Federal Government to coerce seceding States; that is to say, make war against all the inhabitants of every State in which an ordinance of secession had been or should be passed. Now, mark how plain a tale will put you down. Mr. Stanton never was consulted on that subject by the President until after he was Attorney-General; and he never at any time gave such advice as you put into his mouth. He never entertained any opinion of that kind, for he was a lawyer of large capacity and could not believe an absurdity. He had too much regard for his professional character to maintain a legal proposition which he knew to be false. He certainly would not have so debased himself in the eyes of the Administration with whom he was particularly desirous, at that time, to stand well.

On this point I wish to be very distinct. I aver that Mr. Stanton thoroughly, cordially, and constantly approved of and concurred in the constitutional doctrines which you denounce as timid and treasonable. He indorsed the opinion of his predecessor with extravagant and undeserved laudation; he gave his adhesion to the annual message in many ways; and the special message of 8th January, 1861, which expressed the same principles with added emphasis, was carefully read over to him before it was sent to Congress, and it received his unqualified assent. The existing evidence of this can be easily adduced; it is direct as well as circumstantial, oral as well as documentary, and some of it is in the handwriting of Mr. Stanton himself. If you are willing to put the question into a proper form for judicial investigation, I will aid you in doing so, and give you an opportunity to make out your case before an impartial tribunal.

If your statement be true that Mr. Stanton disbelieved in the prin-

ciples to which the Administration was unchangeably pledged, how did he come to take office under it? Was he so anxious for public employment that he consented to give up his own convictions and assist in carrying out measures which his judgment condemned as the offspring of timidity and treason? Or, did he accept the confidence of the President and the Cabinet with a predetermined intent to betray it? Either way you make him guilty of unspeakable baseness.

But conceding that he would accept, why did the President, with the consent of his advisers, give the appointment to a man whom they knew to be hostile to them upon points so vital not only to the public interests but their own characters? That at such a time they would invite an undisguised enemy into their counsels, is a tale as wildly improbable as any ever swallowed by the credulity of the Salem witch-finders. Your own consciousness of this compels you to explain by attributing it to a special intervention of Divine Providence. Your impious theory is that Almighty God procured this appointment miraculously, in order that you, the enemies of the American Constitution, might have a spy in the camp of its friends. This will not serve your turn. Reason never refers a human event to supernatural agency, unless it be impossible to account for it in any other way. The mystery of this case is easily cleared up by the hypothesis that you have misrepresented it from beginning to end; which is no miracle at all, but quite in the natural order of things.

The truth is, Mr. Stanton was in perfect accord with the Administration, before and after he became a part of it, on every question of fundamental principle. He had unlimited confidence in the men with whom he was acting, and they confided in him. For his chief and some of his colleagues he professed an attachment literally boundless; for all of them who stayed during the term, and for Thompson, who did not stay, he was warm in his friendship. You would now have us believe that these were merely the arts of an accomplished impostor; that while he was, in appearance, zealously co-operating with us, he was reporting to you that "he saw treason in every part of the Government"; and that he was secretly using all the means in his power to stir up the vilest passions against us.

Some overt acts of the treachery you ascribe to him are curious; for instance, the Sumner story, which you tell with singular brevity and coolness. Mr. Sumner called on him at his office, for what purpose you do not disclose. Mr. Stanton did not receive his visitor either with the politeness of a gentleman or the courtesy due to a Senator, much less with the cordiality of a friend; but hustled him out of the building as if ashamed to be seen with him in daylight. He told him expressly that he did not dare to converse with him there, but would see him at one o'clock that night. The hour came, and then, when the city was wrapped in sleep, he skulked away to the



meeting-place, where, under the cover of darkness, he whispered the tales which he *did not dare to utter* in the hearing of the parties they were intended to ruin. And those parties were his friends and benefactors ! Into what unfathomed gulfs of moral degradation must the man have fallen who would be guilty of this ! But remember, this is another second-hand story, and you are not a competent witness. We will trouble you to call Mr. Sumner, if you please. Let him testify what treason Stanton disclosed, and explain, if he can, how this midnight and secret information against men whom he was afraid to confront, is consistent with Mr. Stanton's character as a courageous, outspoken, and honest man.

He said nothing whatever to us about the treason which he saw in every part of the Government. He made no report of his discoveries to the President. He maintained unbroken his fraternal relations with his colleagues. By your own account, he admitted to Mr. Sumner that he did not *dare to speak* of such a thing even in his own office, lest it might reach the ears of his associates in the Administration. Among the members of Congress whom you name as the recipients of his secret communications, not one man of moderate views is included ; much less did he speak to any friend of the parties accused. He cautiously selected their bitterest enemies, and poured his venom into hearts already festering with spite. The House raised a committee "to investigate treasonable machinations and conspiracies," upon which there were members of both parties. Stanton did not go before it and tell his story ; nor did he mention the subject to Cochrane, Reynolds, or Branch ; but he "made an arrangement by which Messrs. Howard and Dawes were informed" of whatever they wanted to know. It appears, too, that a committee of vigilance was organized by the more active Republican members of Congress ; in other words, the extreme partisans of both Houses got up a secret body of their own, not to perform any legal duty pertaining to their offices, not to devise public measures for averting the ruin which threatened the country, but to prowl about in the dark for something to gratify personal malice or make a little capital for their party. You were a member of that committee, as it was fit you should be, and Mr. Stanton gave you "warnings and suggestions" how to proceed. This is what you call "rising in that crisis above the claims of partisanship." At night he assisted you to rake the sewers in search of materials to bespatter his colleagues, and every morning he appeared before them to "renew the assurances of his distinguished consideration." It was thus that, in your estimation, "he consecrated himself to the *lofty* duties of an *exalted* patriotism."

What cargoes of defamatory falsehood he must have consigned to your keeping ! You do not break the foul bulk, but you have given us some samples which deserve examination. He denounced Mr.

Toucey as false to his country, inspired Dawes's resolution against him, and expressed the belief that he ought to be arrested. Let us look at this a moment.

To Mr. Toucey's face Mr. Stanton breathed no syllable of censure upon his official conduct as head of the Navy Department. To the President or Cabinet he expressed no doubt of his wisdom, much less of his honesty. He met him every day with a face of smiling friendship. Toucey certainly had not the remotest idea that Stanton was defaming him behind his back, or conspiring with abolitionists to destroy his reputation. Can it be possible that Stanton was the author of the Dawes resolution?

That resolution is found in the "Congressional Globe," second session, Thirty-sixth Congress, 1860-'61, part second, pp. 1423, 1424. The proceeding was begun, no doubt, in the hope of finding something on which the charge could be founded of scattering the navy to prevent it being used against the South. But that failed miserably; and the committee reported nothing worse than "a grave error" of the Secretary in accepting without delay or inquiry the resignation of certain naval officers. Even this had no foundation in law or fact. Its truth was denied and the evidence called for; none was produced. The right to explain and defend was demanded, but the gag of the previous question was applied before a word could be said. The accusers knew very well that it would not bear the slightest investigation. Mr. Sickles said truly (amid cries of "Order!") that censure without evidence disgraces only those who pronounce it. Mr. Toucey's reputation was never injuriously affected by it in the estimation of any fair-minded man. But you fish it up from the oblivion to which it has been consigned, and try to give it decency and dignity by saying that Stanton inspired it. You do not appear to perceive the hideous depth to which your assertion, if true, would drag him down. It is not true; the whole business bears the impress of a different mind.

Mr. Stanton also suggested that his colleague and friend Toucey *ought to be arrested*. This could not have been a proposition to take him into legal custody on a criminal charge regularly made. That would have been utterly impossible and absurd. The Dawes committee itself could find nothing against him but an error of judgment. The suggestion must have been to kidnap him, without an accusation or proof of probable cause, and consign him to some dungeon without trial or hope of other relief. If Stanton attempted to get this done, he was guilty of such perfidy as would have shocked the basest pander in the court of Louis XV. But to confute your libel upon Toucey and Stanton both, it is only necessary to recollect the fact that kidnapping of American citizens was at that time wholly unknown and absolutely impossible. We were living under a Demo-



cratic Administration, the country was free, and law was supreme. Tyranny had not yet sunk its bloody fangs into the vitals of the national liberty. The systematic perjury which afterward made the Constitution a dead letter was not then established as a rule of political morality.

Your whole account of the "Cabinet scene" at which Floyd, "raging and storming, arraigned the President and Cabinet," and "the President trembled and grew pale," and "Stanton met the baffled traitor and his fellow-conspirators with a storm of fierce and fiery denunciation," is a pure and perfectly baseless fabrication. It is absurd to boot. What was Floyd's arraignment of the President and the Cabinet for? You say for violating their pledges to the secessionists; and the charge against the President and the Cabinet of violating *their* pledges was predicated solely on the fact that Colonel Anderson had removed from Fort Moultrie to Fort Sumter; and *Floyd was disappointed in Colonel Anderson*, whom he "had expected," as a Southern man, to "carry out his purposes in the interest of treason." This is mere driveling at best, and it is completely exploded by the record, which shows that Colonel Anderson's transfer of his force from Fort Moultrie to Fort Sumter was in literal obedience to orders from the President, which Floyd himself had transmitted. Moreover, Floyd at that time was not in a condition to arraign anybody. He himself had just before that been not only arraigned but condemned, and the President had notified him that he would be removed if he did not resign. Was it this broken-down and powerless man who made the President tremble and grow pale by complaining that a subordinate had unexpectedly obeyed his own orders? You are not silly enough to say so. Was it Stanton's "storm of fierce and fiery denunciation"? Stanton was no *stormer* in the presence of such men as he then had to deal with. His language was habitually deferential, his whole bearing decent, and his behavior at the council-board was entirely free from the insolence you impute to it. Your tales do not hang together. No one can give credence to your report of bold and stormy denunciation by Stanton in the presence of his chief and his colleagues, and at the same time believe what you say of him at another place, where you describe him as a dastard, skulking about in the dead of night to find a place of concealment remote enough to make him safe, and confessing that he did not dare to breathe his accusation in the face of day. The crawling sycophant—the stealthy spy—who bargained so carefully for darkness and secrecy when he made his reports, must have been wholly unfitted to play the part of Jupiter Tonans in a square and open conflict. It is not possible that the fearless Stanton of your "Cabinet scene" could be the same Stanton who, at one o'clock in the night, was "squat like a toad" at the ear of Sumner—

"Essaying by his devilish arts to reach  
The organs of his fancy."

I take it upon me to deny most emphatically that Mr. Stanton ever "wrote a full and detailed account of that Cabinet scene" by which you can have the least hope of being corroborated. I can not prove a negative; but I can show that your assertion is incredible. That he should have coolly indited a letter, even though he never sent it, filled with foolish brags of his own prowess, which half a dozen men then living could prove to be false, was not consistent either with his prudence, veracity, or taste. Besides, he often spoke with me about the events of that period, and never in my hearing did he manifest the slightest disposition to misunderstand or misrepresent them. On the contrary, when a statement resembling yours about a Cabinet scene was published in a London paper, I suggested that he ought to contradict it; and he replied, explaining how and by whom it had been fabricated, but said it was not worth a contradiction, for every man of common intelligence would know it to be a mere tissue of lies. You can not destroy Stanton's character for sense and decency by citing his own authority against himself. Nor can you find any other proof to sustain the story. It is the weak invention of some scurvy politician, who sought to win the patronage of one administration by maligning another:

"Some busy and insinuating rogue,  
Some cogging, cozening slave, to get some office,  
Hath devised this slander."

Your account of his raid upon the Treasury, in company with Governor Morton, would look very strange in a panegyric made by anybody else but you. I will restate the facts you have given, but without the drapery by which you conceal from yourself the view of them which must unavoidably be taken by all men who believe in the obligation of any law, human or divine. In the winter of 1863, the Legislature of Indiana was dissolved before the appropriations had been made to carry on the State government or aid in putting troops in the field. Of course, Congress did not and could not make appropriations for carrying on the State government, or putting troops in the field, which the State was bound to raise at her own expense. But the Governor determined to get what money he wanted without authority of law, and he looked to Washington for assistance. President Lincoln declined to aid him, because no money *could* be taken from the Treasury without appropriation. Mr. Stanton, being applied to, saw the critical condition of the Governor, and, without scruple, joined him in his financial enterprise. He drew a warrant for a quarter of a million dollars, and gave it to the Governor to spend as he pleased, not only without being authorized by any appropriation for



that purpose, but in defiance of express law appropriating the same money to another and a totally different object. If this be true, the guilt of the parties can hardly be overcharged by any words which the English language will supply. It was getting money out of the public Treasury, not only unlawfully, but by a process as dishonest as larceny. It involved the making of a fraudulent warrant, of which the moral turpitude was no less than that committed by a private individual when he fabricates and utters a false paper. It was a gross and palpable violation of the oaths which the Governor and Secretary had both taken. It was, by the statute of 1846, a felonious embezzlement of the money thus obtained, punishable by a fine and ten years' imprisonment in the penitentiary. The parties, according to your version, were both conscious of the high crime they were perpetrating, for you make one say to the other, "If the cause fails, you and I will be covered with prosecutions, and probably imprisoned or driven from the country." You do not diminish or mitigate the offense one whit by saying that the money was afterward accounted for. A felony can not be compounded or condoned by a simple restitution of the spoils; and the law I have cited was made expressly to prevent officers charged with the safe-keeping, transfer, or disbursement of public money from using it to accommodate friends in a "critical condition." But what will be said of your trustworthiness as a contributor to history when the public comes to learn that this whole story is bogus? I pronounce it untrue in the aggregate and in the detail—in the sum total and in every item. The truth is this: In 1863 the Democratic majority of the Indiana Legislature were ready and willing to pass their proper and usual appropriation bills, but were prevented by the Republican minority, who "bolted" and left the House without a quorum until the constitutional limit of their session expired. The Governor refused to reconvene them, and thus, by his own fault and that of his friends, he was without the ways and means to pay the current expenses of the State. He was wrong, but his error was that of a violent partisan, not the crime of a corrupt magistrate. He did not come to Washington with any intention to relieve his necessities by plundering the Federal Treasury. He made no proposition either to Mr. Lincoln or Mr. Stanton, that they or either of them should become his accomplices in any such infamous crime. His purpose was to demand payment of a debt due, and acknowledged to be due, from the United States to the State of Indiana. The money *had been appropriated* by Congress to pay it, and *it was paid according to law!* I know not how Mr. Morton may like to see himself held up as a felon confessing his guilt, but I can say with some confidence that, if Mr. Stanton were alive, he would call you to a very severe reckoning.

What must amaze the readers of your article more than anything else is the perfect sincerity of the belief which you express, directly or



indirectly, in every line of it, that the base misconduct you attribute to Mr. Stanton is eminently praiseworthy. You seem to be wholly unconscious of defaming the man you meant to eulogize. But, if your facts be accepted, the honor and honesty of them will not be measured by your standards. It may be true that public opinion has of late been sadly debauched ; but the American people have not permanently changed their code of morality. Good faith between man and man, personal integrity, social fidelity, observance of oaths, and obedience to the laws which hold society together, have heretofore been numbered among the virtues, and they will be again. The government of God has not been reconstructed. Fraud or force may abolish the Constitution, but the Ten Commandments and the Golden Rule are beyond your reach ; some persons have faith enough to believe that even "the gates of hell shall not prevail against them."

The odious character you have given Mr. Stanton is not merely unjust in itself, but, if uncontradicted, it must lead to other misconceptions of him. Besides the offenses against law, justice, humanity, and truth which you have enumerated and assigned to him for his glorification, he has been charged with others which, if established, must expose him to universal execration. For instance, it is asserted that, in the winter of 1861, when he was a member of the Cabinet, he gave to Governor Brown, of Mississippi, the most emphatic assurance of his conviction that secession was right, and urged him to "go on" with it ; that in 1862, while he was writing the most affectionate letters to General McClellan, he not only maligned him at Washington, but maliciously plotted his defeat and the destruction of his army before Richmond ; that he refused in 1864 to receive the Andersonville prisoners when offered freely without ransom, exchange, or other equivalent, though he knew if left there they must perish miserably for want of the medicine and food which their captors had not the means to give them. These accusations, you are aware, have often been made with horrible aggravation which I need not repeat. His friends have denied and discredited them, mainly on the ground that his character was wholly above such imputations. But you have done your full best to make this defense worthless. If he wore the cloak of constitutional Democracy with us, and put on the livery of abolitionism with you, why should he not assume the garb of a secessionist with men of the South ? If he tried to get his friend Toucey kidnapped, what moral principle could hinder him from contriving the ruin of his friend McClellan ? If he craftily exerted himself at your end of the avenue to bring on a bloody civil war, which according to his own declarations at our end was unlawful and causeless, what crime against human life was he not capable of committing ? If he willfully left our prisoners to certain starvation, and then managed falsely to throw the odium of their death upon the political enemies of the



party in power, and thus contributed very largely to the enslavement of the Southern States, was not that an act of "intense and abounding patriotism," as well worthy of your praise as some others for which you have bestowed it? Those who give credit to you will find it perfectly logical to believe the worst that has ever been said of him.

Sejanus has passed for about the worst specimen of ministerial depravity whom we have any account of; but nothing is recorded of him which might not be believed of Stanton, if you are regarded as credible authority; for you have made it a labor of love to paint him as a master in the loathsome arts of treachery, dissimulation, and falsehood—unfaithful alike to private friendship and to public duty. With the talents he possessed and the principles you ascribe to him, he might have made an invaluable grand vizier to a Turkish Sultan—provided the Sultan were in the prime of life and had no powerful brother near the throne; but in a free country such a character can not be thought of without disgust and abhorrence.

In your eyes the "intense and abounding patriotism" of Stanton is sufficient to atone not only for all the faults he had, but for all the offenses against law and morals which the utmost fertility of your imagination can lay to his charge; and patriotism in your vocabulary means devotion to the interests of that political sect which has you for one of its priests. This will not suffice. You can not safely blacken a man with one hand and neutralize the effect by daubing on the whitewash of patriotism with the other. Patriotism, in its true sense, does indeed dignify and adorn human nature. It is an exalted and comprehensive species of charity, which hides a multitude of sins. The patriotism of Washington, which laid broad and deep the foundation of free institutions and set the noble example of implicit obedience to the laws; the patriotism of John Hampden, who voluntarily devoted his fortune and his life to the maintenance of legal justice; the patriotism of Cato, who resisted the destructive madness of his countrymen and greatly fell with a falling state; the patriotism of Daniel O'Connell, who spent his time and talents in constant efforts to relieve his people from the galling yoke of clerical oppression; the patriotism of the elder Pitt, who, speaking in the cause of universal liberty, loudly rejoiced that America had resisted the exactions of a tyrannical Parliament—to such patriotism some errors may be pardoned. When men like these are found to have committed a fault, it is well that history should deal with it tenderly—

"And, sad as angels for the good man's sin,  
Weep to record and blush to give it in."

But the loyalty that tramples on law—the fidelity which stabs the liberties it ought to protect—the public zeal which expends itself in gratifying the vindictive or mercenary passions of one party by the

unjust oppression of another—this kind of patriotism has less claim to the admiration of the world. It is a cheap thing, readily supplied to any faction unprincipled enough to pay for it. It is entirely too “intense and abounding,” and its intensity and abundance are always greatest in the worst times. It does not sanctify evil deeds. If it be not a sin in itself, it certainly deserves to be ranked among what Dr. Johnson calls “the rascally virtues.”

Mr. Stanton’s reputation is just now in a critical condition. He took no care of it while he lived, and he died, like Bacon, leaving a vulnerable name “to men’s charitable speeches.” He needs a more discriminating eulogist than you, and a far better defense than I am able to make. I have not attempted to portray his good qualities; I intended only to protest against your shameless parade of vices to which he was not addicted, and crimes which he never committed; and this I have done, not only because it is just to him, but necessary for the vindication of others.

## II.

*To the Hon. Henry Wilson, Senator from Massachusetts:*

CONTRARY to my first intention, and not without reluctance, I lay aside other business of far greater importance while I take a brief review of your supplemental eulogy on Stanton. The occurrences which caused this change of mind might require explanation, but they are too entirely personal to occupy any space in these pages. Without more preface I give you my thought on your latest essay.

You take violent exceptions to my former letter as being vituperative and ill-tempered. Let us see how the account stands between us on the score of mere manners, and then determine whether you have a right to set yourself up as an *arbiter elegantiarum*.

You wrote, or caused to be written, and published in a magazine of large circulation, an article in which you attacked the reputation of certain persons in a style so scandalous that vituperation is no name for it. Without reserve or qualification you pronounced them guilty of the worst crimes known among men. The specific acts of which you accused them, and the opprobrious epithets you applied to them, were as insulting as you could make them. Most of the gentlemen thus assailed were dead; but that made no difference to you—your invective was not checked by any regard for the feelings of friends or relatives. The indecency of this was greatly aggravated by the fact that you put it in the form of a funeral panegyric upon a man whose recent and sudden death should have sobered your party rage and solemnized your heart, or at least operated as a temporary sedative upon your appetite for defamation. What was I to do? My first impulse was—no matter what; I did not obey it. But I concluded that all the purposes of a fair vindication might be accomplished by a simple contradiction of your statements, coupled with the plain reasons which would



show them to be unworthy of belief. I did this, and I did no more. I did it in terms so free from unnecessary harshness that I am amazed this moment at my own moderation. But you affirm my denial to be an act of "reckless audacity"; in your eyes my *defense* is an *offense*. I really can not understand this, unless you suppose that your political opponents have no rights, even of refutation, which you are bound to respect, and that slander, like other injuries, is consecrated by loyalty when a Democrat is the sufferer.

You make no attempt to impugn the soundness or truth of the law as I gave it to the President on the 20th of November, 1860. That opinion was very simple as it stood upon the record; and in my former letter I gave you the elementary principles, clarified by the most familiar illustrations, and brought the whole subject down to the level of the lowest understanding. Besides, you had the aid of about a dozen Senators and members of Congress in getting up your reply. With all these helps you certainly might have specified some error in the opinion, if it be erroneous. But you content yourself with merely railing at it. I think I may say, with more confidence than ever, that "you can not be so ignorant of the fundamental law as not to know that our exposition of it was perfectly sound and correct."

While you do not deny its truth, you think you annihilate it by the assertion that it is extensively disapproved. Do you really believe that an officer, dealing with questions of law, is bound to be popular rather than right? Will you never learn that "statesmen" and "patriots" of your school have notions about all the political virtues which a sound morality holds in utter detestation? To flatter the passions and cajole the understanding of the people is not the highest object of any honest man's ambition. Mr. Jefferson thought he ought to "do them as much good as possible in spite of their teeth." But on your theory, to be "ever strong upon the stronger side" is not only good fortune, but high desert; while it is mere imbecility to offend the powerful by letting the countenance of the law shine upon the weak or the oppressed, who can not reward you with office or money. If your theological opinions conform to your ideas of political duty, you esteem the luck of Barabbas as more meritorious than the fidelity of John, or the devotion of all the Marys.

No doubt there was then, as there is now, a set of "small but ferocious politicians," who became completely infuriated against me because I did not falsify the law, advise the President to violate the Constitution, and thus bring on an immediate dissolution of the Union. But you can hardly expect me to regret that I did not escape their censure. They were men who had been taught that enmity to the Constitution was the sum of all public and private virtue. There certainly is not an uncorrupted man in the country who will say that I was to blame for giving the law faithfully and truly.



You declare that "contemporaneous history has already pronounced" against me, and you quote a few words of twaddle, apparently from the writings of some one whose name you are ashamed to mention. You call this a judgment upon me which posterity is not likely to reverse. Political power dishonestly wielded always has hacks to defend its excesses by maligning its opponents. A dozen books of that character have been printed within the last seven years. These productions come within the awkward description you have given of your own; they are "not history or biography, nor intended to be"; they are places of deposit for worn-out calumnies—mere sewers into which the filth of the party is drained off. I hope I am tolerably secure from the praises of this venal tribe; and their abuse is *prima facie* evidence of a character at least negatively good. It is not worth while for you or me to trouble ourselves about *posterity*, for posterity will not probably take much account of us. No doubt you did all in your power to subvert the free institutions of our Revolutionary fathers, and to debauch the political morals of the country; but the utmost exertion of your abilities has not sufficed to raise you above the common file of partisans who have engaged in the same evil work. On the other hand, the cause of liberty regulated by law has had a crowd of advocates so infinitely superior to me that my feeble efforts can not be expected to attract the notice of future generations.

You make no attempt to justify your abuse of Mr. Buchanan; you do not repeat your charge against Mr. Toucey of scattering the ships of the navy to render that arm powerless; nor do you now pretend to assert that Mr. Thompson was guilty of robbing the Indian trust funds. But you offer no reparation, nor even make an excuse, for the wanton and unprovoked injury which you tried to commit upon the character of the living and the memory of the dead. You sullenly permit judgment to be rendered against you by *nil dicit*. I mention this only to say that it very seriously affects your credibility upon the other points. *Falsus in uno, falsus in omnibus*.

You pervert my words and my meaning when you say that I represented Mr. Thompson as being above the range of *ordinary mortals*. I merely declared that his mental ability, good sense, and common honesty placed him very far beyond *you*, who had assailed him with a false charge of felonious robbery. You do not see the justice of this comparison, and you think if I had not been a mere lawyer, having "little acquaintance or association with statesmen," I might have entertained a different notion. Although I consider my calling to be as reputable as any that you ever followed either before or after you took up the trade of a politician, you may make what deduction you please on that account from the value of my judgment; but you must not interfere with my undoubted right to believe (as I do most devoutly) that it would take a great many Wilsons to make one Thompson.



It was not to be expected that Governor Floyd would escape your maledictions. No public man ever provoked such a storm of popular wrath as he did. The President, who had trusted him, withdrew his confidence, drove him from his counsels, and ordered him to be indicted for malversation in office. His colleagues left him to his fate, and there was nobody in all this land to take his part. He had some qualities which commanded the respect of folks like you as long as he lived and moved among you. But absent, unfriended, defenseless, dead—fallen in a lost cause and buried in an obscure grave—he was the very man of all others, in or out of the world, whom your magnanimity would prompt you to attack. But why did you not charge him with misconduct in the financial management of his department? That might have provoked a comparison between him and others, whom you wished to court, to flatter, and whitewash. Therefore, you preferred to take up the exploded charge of sending guns and munitions to the South for the use of the secessionists in the war. Your first paper had nothing in it on this subject except the bald assertion, and I was content with a naked denial. But in your last you come back with a more extended averment, and produce what you seem to suppose will be taken as evidence by at least some of your readers. Let us look at it.

A committee was appointed by the House of Representatives in January, 1861, to ascertain how the public arms distributed during the year 1860 had been disposed of. Mr. Floyd was not present at the investigation; he had not a friend on the committee; it was "organized to convict" him if it could. It reported the evidence, but gave no judgment criminating him with the offense you accuse him of. On the contrary, the opinion was expressed by the chairman that the charges were founded in "rumor, speculation, and misapprehension." But you take up the reported evidence and try to make out a case which the committee did *not* make out, by carefully suppressing all the principal facts and misstating the others.

Your charge of fraudulently sending arms to the South can not be true of the heavy arms made at Pittsburg for the forts in Louisiana and Texas, because they were not sent at all. Floyd gave an order to ship them on the 20th of December, 1860, but it was revoked by the President before a gun was started. It is, of course, possible that Floyd, in making the order, acted in bad faith; but there is no proof of that. On the contrary, Colonel Maynadier, an honest as well as a sharp man, and a most vigilant officer, who knew all the facts of the case and understood Floyd's attitude with regard to secession and union as well as anybody in the whole country, cheerfully set about the business of carrying out the order, though it was not in writing, and testified that he had no suspicion of any improper object or motive in it. In fact and in truth, Floyd was not, in sentiment or in



action, a secessionist until after he saw that the breach between himself and the President, which originated in other matters, was irreparable. Up to the time when he got notice that he must resign, he was steadily opposed to the Southern movement, and the bitterest enemies he had were the leading men of that section. Colonel Maynadier says that "he was regarded throughout the country as a strong advocate of the Union and opponent of secession"; and he adds, as a confirmation of this, that "he had recently published over his own signature in a Richmond paper a letter on this subject which gained him high credit in the North for his boldness in rebuking the pernicious views of many in his own State." After he found the whole Administration against him, he was driven by stress of necessity into the ranks of the party which he had previously opposed.

The great and important fact to which the resolution of the House directed and confined the attention of the committee, and which is made perfectly clear by the evidence, you do not refer to at all, but keep it carefully out of sight from beginning to end of your statement. The question was and is, Whether the Secretary of War under the Buchanan Administration did at any time subsequent to the 1st of January, 1860, treacherously dispose of guns and munitions for the purpose of giving to the South the advantage in the war which the leaders in that section intended to make against the Federal Government? This was the "rumor, speculation, and misapprehension" to which the chairman of the committee alluded; this is substantially what the partisan newspapers and stump-orators have asserted and reasserted over and over again, until thousands of persons in every part of the country have been made to believe it; this is what you meant by your first article, and what you persist in and reaffirm by your last. Now examine the facts. There was a law almost coeval with the government for the distribution of arms among the different States, according to their representation in Congress, for the use of their militia. Under this law the Ordnance Bureau, without any special order from the head of the department, gave to each State that applied for it her proper quota of muskets and rifles of the best pattern and make provided for the regular army. During the year 1860 the number of muskets so distributed was exactly 8,423, of which the Southern States received 2,091, while the Northern States got nearly three times that number, to wit, 6,332. Some long-range rifles of the army caliber were distributed. The aggregate number amounted to 1,728, and they all went to Northern States except 758, about half enough for one regiment, which were divided between Virginia, Kentucky, Tennessee, North Carolina, Mississippi, and Louisiana, the other States of the South receiving none. Why did you conceal these facts? You knew them, and you could not help but see their strict relevancy and great importance. Perhaps you did *not* know that the *suppressio veri* is as



bad as the *suggestio falsi*, and thought it fair to make out a criminal charge against a dead rebel by keeping back so much of the truth as did not suit your purpose.

The fact that the Southern States neglected to take their proper and just quota, which they might have got for the asking, satisfied the committee, and no doubt fully convinced you, that there could have been no fraudulent combination in 1860 between them and the War Department to rob the Government of its arms for their benefit. That concluded the whole case, since it was impossible for a sane man to believe that such a plot could have been formed and acted upon at a previous time, and yet had no existence in the year immediately preceding the war. Nevertheless, the committee went back, and it was proved that in 1859, before any war was apprehended—before the election of Lincoln was dreamed of—before the division of the Democracy, which made his election possible with a million majority against him—Floyd ordered a transfer of 115,000 muskets from Northern to Southern arsenals. This you parade with a great flourish as evidence of a most wicked robbery. But here we find you again at the disingenuous business (is not that a soft phrase?) of keeping back a truth which would have spoiled the face of your story. *These arms were all worthless and unserviceable.* We had 500,000 of them; they cumbered the Northern arsenals, and could not be used; a law had been passed to authorize the sale of them; they were offered for years at two dollars and fifty cents apiece, about one tenth the price of a good gun, and they could not be got off. Twice a considerable number were sold, but the purchasers upon further examination refused to take them. Of these 500,000 condemned muskets, the Secretary of War, in 1859, ordered 115,000 to be sent to the South, doubtless for mere convenience of storage. To “weapon the rebellion” with arms like these would have insured its destruction the instant its forces came into the presence of troops having the improved modern gun in their hands. Floyd could not have done a greater injury to the Southern cause than this would have been. Nor is it possible to believe that Southern leaders would have conspired with him to purloin these useless arms in 1859, and then, in 1860, decline to take the share that legally belonged to them of the best muskets and rifles ever invented. All these facts appear in the evidence reported by the committee, from which you pretend to be making fair and candid citations, and you say not a word about them.

If you were “a mere lawyer,” or any lawyer at all, and would go before a judicial tribunal mutilating the truth after this fashion, you would immediately be expelled from the profession, and no judge would ever permit you to open your mouth in a court of justice again. If you would appear as a witness, and in that character testify to the contents of a written document in the way you have set



out this report to your readers, it might be followed by very disagreeable consequences, which I will not shock your polite ears by mentioning.

Mr. Cobb, while Secretary of the Treasury, performed his duties with singular purity, uprightness, and ability. No enemy has ever ventured to point out a single public act done in that department by him of which the wisdom, the lawfulness, or the honesty could be even doubted. The disjointed and loose accusation of your first paper implied that by some official delinquency he had purposely disorganized the fiscal machinery of the Government, or otherwise perpetrated some malicious mischief on the public credit. Now, however, you are reduced to the old and never-failing resort of "treasonable utterances"; something that he said in private conversation had the effect of injuring the credit of the United States. What was it? It is well known that the prices of all securities, public and private, began to go down immediately upon the presidential election of 1860, and continued going down for years afterward. Is this attributable to the treasonable utterances of Thomas, and Dix, and Chase? But what is the use of pursuing such a subject? Mr. Cobb was dead, and you felt a sort of necessity for doing some despite upon his grave. This feeble absurdity was all you *could* do.

I considered myself bound to defend Mr. Stanton against the praise which described his character as infamous. Down to the time of his apostasy we were close and intimate friends, and I thought I knew him as well as one man could be known to another. I do not claim that he owed me anything; for I made no sacrifices of myself or anybody else to serve him. I advanced him in his profession, and thereby improved his fortune, but he got nothing in that way for which he did not render equivalent services. I strove long, and at last successfully, to remove the prejudices of Mr. Buchanan and others against him, because I thought them unjust, and because it was inconvenient for me that the President should not trust a man in whom I had unlimited confidence. I recommended him pressingly for Postmaster-General upon the death of Mr. Brown, solely for the reason that the exigencies of the public service in that department required a man of his great ability and industry. I caused him to be appointed Attorney-General, because I knew (or thought I knew) that he and I were in perfect accord on all questions, whether of law or policy, which he might have to deal with, and because I was sure that he would handle them not only with fidelity but with consummate skill. But, though he was not in my debt, the apparent warmth of his nature impelled him to express his gratitude in most exaggerated language. After he took office under the Lincoln Administration our paths diverged so widely that I did not often see him. When I did, he sometimes overwhelmed me, as before, with hyperbolical demonstrations of thankfulness and



friendship. If his feelings ever changed, he "died and made no sign" that was visible to me.

Here let me record my solemn declaration that I never saw anything dishonorable in his conduct while I was associated with him. He never disappointed me while he was employed under me, or while we were colleagues in office ; and he never failed me in anything which I had a right to expect at his hands. His enemies spoke evil of him, but that is "the rough brake that virtue must go through," and I allowed no tale-bearer to shake my faith. My own personal knowledge does not enable me to accuse him of any mean or disgraceful act. How far you have succeeded, or may hereafter be able to succeed, in proving him a treacherous hypocrite, is a question to be considered. But I am not one of your witnesses ; my testimony, as far as it goes, is directly against you.

Under these circumstances it was impossible for me to be quite silent when I saw your publication in the "Atlantic," or to confine myself to a mere vindication of the other parties assaulted. It was plain to me that you had "wholly misunderstood the character of Mr. Stanton, and grossly injured him by what you supposed to be a panegyric." Your description of him, if accepted as true, would compel the belief that his whole political life was one long imposture ; that, as a trusted member of the Buchanan Administration, he acted alternately the incompatible parts of a spy and a bully ; that, while he was the chief law-officer of the Government, he was engaged in the foulest conspiracy that ever was hatched against the life, liberty, and honor of a colleague for whom he was at that very time professing unbounded friendship ; and that, as Secretary of War, he did loyally and feloniously embezzle public money to the amount of two hundred and fifty thousand dollars at one time. It is true that you were actuated by no malicious intent. You meant to do him honor. According to your moral apprehensions, all the evil you ascribe to him was good. When you wove for him this disgusting "wreath of ulcers gone to seed," you thought you were decorating his coffin with a chaplet of the choicest flowers. You painted a monster of depravity, and you expected the American people to worship it with all the fervor of savages when they fall down to adore the image of some hideous demon. No doubt the votive offering of your affection took this anomalous form because you believed that duplicity and crime employed against Democrats would give him the highest claim he could have on the admiration of the abolitionists, and because it did greatly increase your own esteem and regard for him. But my interest in his reputation required that he should be properly appreciated by that *honest* portion of the people who still adhere to the moral creed of their fathers.

I do not assert that your last paper proves nothing. I will give



you the full benefit of every fact which you have established. So far as you have shown Mr. Stanton to be guilty of the baseness you impute to him, I will make no contest about it. But I will not yield one inch to any allegation of yours unsupported by evidence. I will try to save out of your hands as much of his character as you have not already destroyed by credible evidence. My effort was to take him down from the pillory to which you have nailed him by the ears as "a fixed figure for Scorn to point its finger at." You have done your strongest to oppose my rescue of him, and any partial success which may have rewarded your struggle must be a great comfort, of which I can not justly deprive you. We will examine your evidence, and see upon what points you have made out your case, and wherein you have come short of your aim.

I. You asserted that Mr. Stanton had been from his earliest youth an abolitionist in his secret heart ; that to leading men of that party he declared himself in entire agreement with them, and hoped for the time to come when he could aid them. In other words, he gave in his perfect adhesion to them, concurred in their views of public morality, and was willing to promote their designs against the Federal and State governments whenever he could make himself most efficient to that end. At the same time he was in the Democratic party by virtue of his declared faith in exactly the opposite sentiments. To us he made himself appear a Democrat of the most ultra class. I do not say that he was an active propagandist ; but all Democrats with whom he spoke were impressed by the seeming strength of his attachment to those great principles, by the application of which they hoped to save the Union from dissolution, the country from civil war, and the liberties of the people from the destruction with which your ascendancy threatened them. We took him on his word, believed him thoroughly, and gave him honor, office, and high trusts. Now, a man may be an honest Democrat or a sincere abolitionist, but he can not honestly and sincerely be both at the same time. Between those two parties the hostility was deadly. Each recognized the other as a mortal foe. They were as far asunder as the poles on every point of principle and policy. They differed not merely about rules for the interpretation of the organic law, but opposed each other on the broad question whether that law was entitled to any obedience at all. One of them respected and revered the Constitution as the best government the world ever saw, while the other denounced it as an agreement with death and a covenant with hell, which it was meritorious even for its sworn officers to violate. If we loved any portion of it more than another, it was that part which guarded the individual rights of the people by habeas corpus, jury trial, and other great judicial institutions, which our ancestors on both sides of the Atlantic had shed so much of their blood to establish ; and it was precisely those provisions which had



your bitterest enmity, and which you made the first use of your power to abolish, trample down, and destroy. Mr. Stanton could not have been truly on more than one side of such a controversy; he could not serve God and Mammon both; he could not be for the Constitution and against it too; he could not at once believe and disbelieve in the sanctity of an oath to support it. He professed most fervently to be heart and soul with us. If he also professed to be with you, he was a wretched hypocrite. If he kept up this fraudulent deceit for thirty years, and thereby got the highest places in the gift of both parties, he was "the most marvelous impostor that ever lived or died."

When your first article appeared, I did not believe that you had any ground for this shocking imputation upon his character. I was compelled to disbelieve and contradict it, for reasons which were then given and need not now be repeated. But I said the testimony of the Chief-Justice would silence my denial. The Chief-Justice has spoken out and sustained your assertion. You do prove by him a declaration from the lips of Mr. Stanton, made nearly thirty years ago, from which the inference is a fair one that he was in the Democratic party with intent "to betray the Constitution and its friends into the cruel clutches of their enemies" whenever he could find an opportunity.

But you are not satisfied with this. To make the brand ineffaceable, you show that several years after his declaration to Mr. Chase, he, being an avowed advocate and champion of Democratic principles, was either appointed by his political brethren, or else volunteered, to answer an abolition lecture delivered at Steubenville by a man named Weld. He disappointed all parties, including the lecturer himself, by declining to come forward, though very pointedly called for. He made no excuse at the time for deserting the cause he had undertaken, but afterward he slipped round secretly and alone to the private room of the lecturer and gave himself in as a convert. "I meant," said he, "to fight you, but my guns are spiked, and I came to say that I now see with you," etc. It never struck Mr. Weld that there was anything sneaking or shabby about this transaction. With the obliquity of vision peculiar to his political sect, he saw nothing but "heartly frankness, independence, moral insight, and keen mental force" in the conduct of a man who privately denounced the opinions and principles which he publicly supported; and twenty-five years afterward Mr. Weld piously thanks God on paper for such an artful dodger to serve as a leader of his party.

The next place you find him after the Steubenville affair is in the van of the Ohio Democracy. They, too, believed in the "heartly frankness and independence" of the declaration he made to *them*. They showed their faith by their works; the Legislature, by a strict

party vote, elected him Law Reporter, an office which he sought eagerly, and received with many thanks.

In all the conflicts of the Buchanan Administration with the abolitionists and their allies, he was an open-mouthed opponent of the latter. He was always sound on the Kansas question, and faithful among the faithless on the Lecompton Constitution. So far as we, his Democratic associates, were permitted to know him, no man detested more than he did the knavish trick of the abolitionists in preventing a vote on slavery, by which it would have been expelled from Kansas, and the whole trouble settled in the way they pretended to wish. He was out and out for Breckinridge in 1860, and regarded the salvation of the country as hanging on the forlorn hope of his election. To Mr. Buchanan himself, and to the members of his Cabinet, he paid the most assiduous court, was always ready for an occasion to serve them, and showed his devotion in ways which sometimes went rather too close to the verge of obsequiousness.

While we were looking at this side of his character, and supposing it had no other, he was, according to your understanding of his history, in "entire agreement" with the deadly enemies of every principle we believed in.

The mere fact that he paid visits to Dr. Bailey is nothing. It is nothing that he there met abolition people. All that might happen, and his fidelity to the Constitution would moult no feather. But you mention it as a remarkable circumstance, and it was remarkable, because abolitionists exclusively were in the habit of assembling there to talk over their plans, to concoct their slanders against the Administration, and to lay their plots for the overthrow of the Government and laws. It was a place where men congregated for political, not merely for social purposes, and Mr. Stanton knew he would be *de trop* unless he was one of them. He accordingly made himself not only acceptable, but interesting, by telling them that he was of Quaker blood, and got his abolitionism by inheritance; his grandfather liberated his slaves—he did—and purged the family of that sin; and Benjamin Lunday took him on his knee when he was a little boy and taught him the political doctrine which he had never forgotten, but which he had opposed by every open act of his life. He was probably fresh from one of these *symposia* when he went into court in the Sickles case, and loudly bragged that he was the *son of slave-holding parents*; his father was a North Carolinian, and his mother a Virginian. You may see that part of his speech on page 51 of the printed trial. It is hard to run with the hare and hunt with the hounds, but Stanton seems to have mastered the difficulty.

Mr. Sumner's testimony to the early and thorough-going abolitionism of Mr. Stanton is entitled to great weight, because it is coupled with an act which attests its entire sincerity. It is a part of his cer-



tificate that when Mr. Stanton's nomination as Secretary of War was sent to the Senate, he (Sumner) immediately rose to urge the confirmation, stated his acquaintance with the nominee, and said, emphatically, "Within my knowledge, he is one of us." Mr. Sumner certainly would not have made such a declaration at such a time, and for such a purpose, unless he had the clearest conviction, based upon personal knowledge, that Mr. Stanton was an abolitionist of the most virulent type, prepared to tread the Constitution and the statute-book under his feet, and ready to go all lengths for the subversion of liberty and justice.

There is another fact corroborating your view, which you have not mentioned, but of which you are fairly entitled to the benefit. When Mr. Stanton went into the War Department, he immediately began to act with reckless disregard of his sworn duty. He surrounded himself with the most loathsome miscreants, and used them for the foulest purposes. Law, justice, and humanity were utterly outraged. Those who knew him as I did, and had heard him curse the perpetrators of such crimes only a month or two before, exercised the charity which believeth all things, and concluded that he was moved by some headlong impulse which had suddenly revolutionized all his thoughts, feelings, and principles of action. But your proofs show that in the kindness of our construction we did not give heed enough to the maxim, *Nemo repente fuit turpissimus*. Such a depth could not be reached by a single plunge. The integrity of his moral nature must have previously undergone that gradual process of decomposition which could result only from long and sympathetic association with the enemies of the Constitution.

On the whole, it must be admitted that you have made out this part of your case. With Democrats he was a Democrat, enjoying their confidence and taking their favors, while he caused it to be well understood among "men of your school in morals and politics" that his devotion to the democracy was entirely simulated. It is now also clear, beyond doubt, that to Southern men he avowed himself a full-blooded secessionist. The testimony of Governor Brown to that effect is as good as any that you have produced to prove him an abolitionist, and you have made the fact so probable in itself that very slight proof would be sufficient to establish it.

Is not my conclusion a fair one from the premises that this is the most "marvelous" imposture upon record? Does the history of the world hold on all its pages of wonders another case in which a man has raised himself to the highest public employments, under two different parties of diametrically opposite and hostile principles, by making simultaneous professions of fidelity to both of them? Do not mention Sunderland, for his hypocrisy gained him nothing; nor Talleyrand, for he was merely a trimmer; nor Benedict Arnold, for he

acted his double part only during a few months, and closed it with ignominious failure. To find a parallel, you must go to another scene of action, and a far lower line of life. Jonathan Wild for twenty years imposed himself on the London police as an honest man and a most zealous friend of justice, pretended to assist the officers in their business, and shared richly in their rewards ; but during all that time he was the adviser, the "guide, philosopher, and friend" of the principal thieves in the city, and to them he constantly betrayed the measures taken by the public authorities for the preservation of order and law.

II. We are directly at issue upon the question whether or not Mr. Stanton advised President Buchanan, before his appointment as Attorney-General, that war might be legally made against the States, and the people thereof, in which ordinances of secession had been passed, by way of coercing them to remain in the Union. You say he was sent for by the President and gave him that advice, accompanied by an argument in writing, which was so convincing that it was inserted in the first draft of the message, but afterward stricken out. No such paper being in existence, and Mr. Buchanan as well as Mr. Stanton being dead, your allegation is easily made ; if it be true, it is hard to prove, and though false, it is harder still to disprove. The evidence you produce is Mr. Dawes's statement that Mr. Stanton told him so. I say nothing about the danger of relying on the accuracy of a conversation, reproduced from mere recollection, after so long a time ; but I answer that it is not true for the following reasons :

1. Mr. Buchanan made it a rule never to seek advice from outsiders on legal questions. When he was in doubt, he took the opinions of those who were officially responsible for their correctness. He had no kitchen cabinet.

2. If he had made this an exceptional case, and taken Mr. Stanton into his counsels by the back stairs, and if Mr. Stanton had furnished him with a paper which produced conviction on his mind that all his constitutional advisers were wrong, he would most certainly have shown it to them, or told them of it.

3. Mr. Stanton was a lawyer of undoubted ability, and the absurd opinion which you attribute to him could not have found a lodgment in his mind, even for one moment.

4. If he had really entertained such a notion, and desired in good faith to impress it upon the Administration, he would not (I think he could not) have concealed it from me. It would have been contrary to the whole tenor of his behavior in those days, and, what is more, very much against his own interests.

5. He did express views exactly the opposite of those which you say he urged upon the President. He indorsed the opinion which I gave on the 20th of November, 1860, in extravagant terms of appro-



bation, adhered steadily to the doctrines of the annual message, and when required officially to pronounce upon the special message of January, 1861, he gave his concurrence heartily, strongly, and unequivocally. In all the discussions upon the subject, he did not once intimate that there was, or ever had been, the slightest difference between him and the other members of the Administration. Do you mean to say that this was mere sham? Was he so utterly devoid of all sincerity, honor, and truth, that he gave the whole weight of his influence and power to the support of a doctrine which he believed to be not only false, but pernicious? If he was such a knave as that, then tell me what reliance can be placed on any statement he may have made to Mr. Dawes.

III. Did he betray the Buchanan Administration while he was a member of it? Was he false to the principles that he pretended to believe in? Was he treacherously engaged with you in trying to defeat the measures he was trusted to support? Did he aid, and strengthen, and assist you in your efforts to blacken the reputation of his associates and friends? Before these questions are answered, let us look for a moment at the situation we were in.

Mr. Buchanan was compassed round on all sides with more difficulties and dangers than any other public man in this country ever encountered. The party which elected him was perfectly routed; its force wasted by division, its heart broken by defeat. Every Northern State was in the hands of enemies, flushed with the insolence of newly acquired power; and after his official condemnation of secession, the South fell away from his side in a body. With bitter, remorseless, unrelenting foes in front, and flank, and rear, he was literally unsupported by any political organization capable of making itself felt. But he was "shielded, and helmed, and weaponed with the truth," and he went right onward in the path made sacred by the footsteps of his great predecessors. He declared the secession ordinances mere nullities; the Union was not for a day, but for all time; a State could not interpose itself between the Federal Government and individual citizens who violated Federal laws; the coercive power did not apply to a State, and could not be used for purposes of indiscriminate carnage in which the innocent and the guilty would be mingled together; but the laws must be executed, and the just rights of the Federal Government maintained in every part of the country against all opposers. The whole theory of the Constitution, as expounded by the men that made it, and all their successors down to that time, justice, humanity, patriotism, honor, and conscience, required him to announce and maintain these principles. They were not only true, but were either expressly or impliedly admitted to be true by all except the open avowed enemies of the Union. The secessionists, of course, had trained themselves to a different way of thinking, and



they immediately assumed an attitude of pronounced hostility to the Administration. The foremost of the abolition orators and the leading newspaper organ of the so-called Republican party took the high ground that the Southern States had a right to break up the Union if they pleased, and could not justly be opposed. But though they "drew much people after them," and gave great encouragement to the insurrectionary movement, no man who was at once honest, intelligent, and true to the country, failed to see the wisdom of the President's views. The President elect indorsed them fully on his way to the capital, as he did afterward by his official action. From all quarters addresses and petitions came up, which showed the popular appreciation of them. Even the Massachusetts Legislature, without one dissenting voice in its more numerous branch, and by an overwhelming majority in the other house, passed a solemn resolution approving them in the strongest language, and offering to aid in carrying them out. But everything depended on Congress; and what did Congress do? Both Houses were completely in the hands of shallow partisans, who were either too stupid to understand their duty, or too dishonest to perform it. The men of most ability and integrity whom Republican constituents had sent there—such men, for instance, as Charles Francis Adams—were heard but not heeded. The President, thoroughly informed on the whole subject, communicated all the facts in a special message, told Congress that the powers confided to him were wholly inadequate to the occasion, demonstrated the absolute necessity of further legislation, and implored them not to postpone it, for the danger, imminent then, was increasing with every moment of delay. To all this they were as deaf as adders. They could be reached by no appeal to their hearts or consciences. They neither adopted the executive recommendation, nor gave a reason for refusing. If any measure, having the least tendency either to restore peace or prepare for war, got so far as to be proposed, it was uniformly referred to a committee, where it was sure to be quietly strangled. The issues of life and death to the nation hung upon their action, and they would not lift a finger to save it. No legislative body, since the beginning of the world, ever behaved in a great crisis with such scandalous disregard of its duty.

But if there were no statesmen among the managers of that Congress, there were plenty of demagogues; if they were indifferent to the fate of the nation, they were intensely alive to the interests of their faction; if the regular committees slept supinely on the great public questions submitted to them, the secret committee, spawned by a caucus, went prowling about with activity as incessant as it was stealthy and malignant. You could not gainsay the views which the Administration took of their own duty or yours, nor deny the wisdom of the recommendations they made; but you could, and did, answer



them with a storm of personal detraction. The air was filled with falsehood ; the atmosphere was saturated with slander, the voice of truth was drowned in "the loud roar of foaming calumny." This crusade was conducted with so much vigor and success that some members of the Administration were pursued into private life by the rage of the partisan mob, and thousands of the worthiest men in the land were actually imprisoned and persecuted almost to death, for nothing worse than expressing a friendly opinion of them. The messages of the President will stand for ever a monument to the wisdom, foresight, and honest patriotism of the executive Administration, while history will proclaim through all time the dishonor of that Congress which could answer such appeals with nothing but vituperation and insult.

It was at such a juncture that Mr. Stanton was appointed to take a high and most confidential place in the Administration. His language glowed with gratitude, his words spoke all the fervor of personal devotion to his chief and his colleagues ; he gave his thorough approval to the measures which they thought necessary to preserve the unity of the nation in the bonds of peace. Yet you inform us that he did immediately put himself in communication with the opposition ; sought out you and others whom he had never known before, and sought you solely because you were enemies of the Administration ; offered himself as your spy, and did act for you in the capacity of a false delator ; went skulking about at midnight to aid you in defeating the measures which with us he pretended to support ; forgathered with your secret committee, and gave you assistance in carrying on your personal warfare against his benefactors ; nay, worse than all that, he helped you to trump up a charge of treason against one of his colleagues—a charge which he knew to be false—a charge for which, if it had been true, that trusting friend might lawfully, and would deservedly, have been hanged by the neck till he was dead. Oh ! it was too foul ; it was base beyond the lowest reach of comparison. If your story be unfounded—if Stanton, after all, was a true and honorable man—how will you answer in the judgment day for this horrible outrage on his memory and on the feelings of his friends ?

"If thou dost slander *him* and torture *us*,  
Never pray more ; abandon all remorse ;  
On horror's head horrors accumulate ;  
For nothing canst thou to damnation add  
Deeper than that."

But let justice be done though the heavens should fall. Some, at least, of your statements are true, unless Mr. Dawes, Mr. Howard, Mr. Seward, and Mr. Sumner have volunteered to help you by sacrificing the character of "the great Secretary."

I will not waste time upon the details which your witnesses have given of his treachery. It appears to have been a free-will offering of his own, induced by no solicitation of yours, but tendered by himself *ex mero motu*. The moment he was inducted into office he looked about to ascertain who were the bitterest and most malignant enemies of the men to whom he owed all his public importance and much of his private prosperity. He found them quickly, and, though they were entire strangers to him, he put himself immediately into secret communication with them, took service under them as their regular spy, and exercised himself diligently in that base vocation, making reports to them daily, and sometimes twice a day, until the close of his official term, when his occupation necessarily ceased. This mean employment must have taken up most of the time which should have been devoted to the duties of an office on which the public business, always heavy, was then pressing with unusual weight.

He did not communicate any knowledge which was necessary to guide you in the discharge of your duties, for every fact of that kind was as accessible to you as to him; the Administration kept nothing back; the President volunteered to give all he knew concerning the state of the Union; no department was closed against your investigations; every call for information was promptly and fully answered. If that had not been enough, every member of the Cabinet would have been perfectly free to speak with any member of Congress, or to go in person before any committee. Mr. Seward did confer with me fully at the State Department in open daylight, without any dodging about it; and he was always welcome, as he is now, to tell everything that passed, for he neither asked nor could have asked any question, if the country had an interest in it, which I was not willing to answer. With all the channels of truthful information thus open and unobstructed, you preferred to get what you wanted from a spy. Mr. Howard has the cheek to proclaim that during the "*labors*" of his committee, instead of acting upon honest and legitimate evidence, he sent inquiries to this secret informer, who answered by giving information of "*great importance*," but his communications "*were always indirect and anonymous!*"

If there be one sentence in your whole article which is marked more than another with your characteristic hardihood of assertion, it is that in which you try to make a merit of Stanton's treachery. It is curiously reckless, and for that reason worth giving in your very words. "These facts," say you, "were stated to illustrate Mr. Stanton's exalted *patriotism*, which prompted him to rise *above* the claims and clamors of partisanship, and to invoke the aid of loyal men *beyond* the lines of his own party, and *outside* of the Administration of which he was a member, to *serve his imperiled country*, menaced with a foul and wicked revolt." Why, this is precisely what the President and



all the honest men of his Cabinet were doing openly and above board. They had no legal power which could avail to serve the "imperiled country" without the co-operation of Congress, which was wholly ruled by the opposition. They invoked "the aid of loyal men beyond the lines of their own party and outside of the Administration," because it was from thence only that aid could come. But with you and your associates the "claims and clamors of partisanship" were so much higher than considerations of public duty, that you not only refused all aid to the country, but you insulted, and abused, and villified the President and his friends for asking it. Was Stanton, like the other members of the Administration, invoking aid for the imperiled country? Did he skulk about in secret to effect in that way what his brethren were trying to accomplish by an open appeal to the reason and conscience of their political opponents? If so, how did he succeed? Did his secret, anonymous, and indirect communications ever produce the slightest symptom of patriotic emotion in the minds of those who received them? What did you, or Mr. Sumner, or Mr. Dawes, or Mr. Howard, or Mr. Seward, do to avert the great calamity of civil war? What measures did any of you bring forward to serve the country? In that hour of peril what man among you acted like a man? Which of you "rose to the height of that great argument," or showed himself fit in mind or heart to meet the responsibilities of the time? The Union was indeed "menaced with a foul and wicked revolt," and all you did was to "let the Union slide." The public danger excited no anxiety in your minds; public affairs received no attention at your hands; but you were all the while mousing about after some personal calumny by which you hoped to stir up the popular passions against the true friends of the country; and Stanton, unless you slander him, made love to the infamous business of helping you.

You have given us but small samples of the "indirect and anonymous communications" which Stanton made to you and your associates. The bulk of them must be enormous. He was engaged for two or three months fabricating at least one tale every day for Mr. Seward, and another consisting of "the most startling facts" to suit the needs of Mr. Howard, while you and Mr. Dawes were gratified in a similar way at the same time. Are these "startling facts" held back for some other funereal occasion? Take notice yourself, and tell your friends, that while their stories are hid away from the light, the presumption that they are not only false, but known to be false, is growing stronger and stronger every day. You had better open your budgets at once.

There is a point or two here on which I would like to draw you out. Mr. Seward says that he and Mr. Stanton discussed and settled *measures*. The topic which absorbed the attention of all minds at that time was Fort Sumter. Compared to that, all others were insig-



nificant ; and of course the measures relating to it were not overlooked. It is known, from the published statements of Mr. Welles, Judge Campbell, and others, that Mr. Seward was deeply engaged in a plot to surrender that fort, which plot he afterward brought to a head, and by sundry tricks nearly made it successful. Stanton professed to agree with us that the fort ought to be kept ; but you have shown that his professions in the Cabinet were not very reliable, and Governor Brown has proved that he could be a secessionist as well as anything else, if occasion required it. Now, what did they *settle* upon about Fort Sumter ? They were engaged in something which both knew to be disreputable if not criminal ; their secrecy, their employment of a medium, their quick dodge when they met on the street, the mortal terror of detection which they manifested throughout, all show plainly enough that they had no honest object. Tell us if they were contriving a plan to put the strongest military fortress of the Government into the hands of its enemies.

The midnight meeting between Messrs. Sumner and Stanton is in all its aspects the most astounding of historical revelations. If you recall Mr. Sumner to the stand, it is hoped that he will see the necessity of being much more explicit than he has yet been. From what he has said, it appears that Stanton "described to him the determination of the Southern leaders, and developed particularly their plan to get possession of the national capital and the national archives, so that they might substitute themselves for the existing Government." This is so extremely interesting that it would be a sin against the public not to examine it further.

Early in the winter somebody started the sensational rumor that on or before the 4th of March a riot would be got up in Washington, which might seriously endanger the peace of the city. It was discussed and talked about, and blown upon in various ways, but no tangible evidence of its reality could ever be found. The President referred to it in a message to Congress, and said he did not share in such apprehensions ; but he pledged himself in any event to preserve the peace. When the midnight meeting took place, the rumor had lived its life out—had paid its breath to time and the mortal custom of such things at Washington ; it was a dead canard which had ceased to alarm even women or children. This was certainly not the subject of the communication made that night at one o'clock. Stanton did not surround himself with all the adjuncts of secrecy, darkness, and terror, to tell an old story which had been in everybody's mouth for weeks before, of an impossible street riot by the populace of Washington. What he imparted was a secret not only new, but deep and dangerous, fit for the occasion, and worthy to be whispered confidentially at midnight. He disclosed a "*plan* of the Southern leaders to get possession of the *capital* and the archives, and to *substitute them-*



*selves for the existing Government.*" It was a *coup d'état* of the first magnitude—a most stupendous treason. This plan Mr. Stanton "*developed particularly,*" that is to say, gave all the details at length. Mr. Sumner manifestly believed what he heard; he received the revelation into his heart with perfect faith; and he did not underestimate the public danger; but he did nothing to defeat the treason, or even to expose it. He was thoroughly and minutely informed of a plan prepared by Southern leaders to revolutionize the Government, and he kept their counsel as faithfully as if he had been one of themselves. He took Stanton's frightful communication as quietly as he took the President's message. Nothing could stir his sluggish loyalty to any act which might tend to save his "imperiled country."

Mr. Sumner says that when Mr. Stanton made these statements to him he was *struck* "by the *knowledge* he showed of *hostile movements.*" That is precisely what strikes me also with wonder and amazement. Where in the world did he learn "the determination of the Southern leaders"? Where did he get an account of the intended *coup d'état* so detailed that he was able to *develop it* particularly? This knowledge becomes astounding when we recollect that, so far as now appears, nobody else outside of the "Southern leaders" had the least inkling of it. Is it possible that his connection with the secessionists, and his professed devotion to their cause, went so far that they took him into their confidence, and told him what "hostile movements" they intended to make on the Government? How did he get these secrets if not from them? Or must we be driven at last to the conclusion that the whole thing was a mere invention, imposed on Mr. Sumner to delude him?

But Mr. Sumner owes it to the truth to make a fuller statement. Let us have the *particulars* which Mr. Stanton *developed* to him. We have a right to know not only who were the Southern traitors engaged in this plan, but who were confederated with them in Washington. I suppose Mr. Sumner, as well as Mr. Stanton, had "instinctive insight into men and things" enough to know that no government was ever substituted for another by a sudden movement, without some co-operation or connivance of officers in possession. Who among Stanton's colleagues did he say was engaged in this affair? Did he charge the President with any concern in it? If he declared all or any of them to be innocent, does not Mr. Sumner see the injustice of keeping back the truth? Did Stanton tell him that he had communicated the facts to the President and Cabinet? If no, did he give a reason for withholding them? And what was the reason? Was the guilty secret confined to his own breast, or did any other member of the Administration share his knowledge of it? If yes, who? Mr. Sumner has struck so rich a vein of historical fact (or fiction) that he is bound to give it some further exploitation.



The following passage in Mr. Sumner's letter to you excites the liveliest desire for more information. After describing his visit to the Attorney-General's office, and Mr. Stanton's reception of him, he goes on thus: "He began an earnest conversation, saying he must see me alone—that this was impossible at his office—that he was watched by the traitors of the South—that my visit would be made known to them at once; and he concluded by proposing to call on me at my lodgings at one o'clock that night," etc., etc. Why was Mr. Stanton afraid of the Southern traitors? Why did they set a special watch over him? No other member of the Administration was tormented with a fear like that. All of Mr. Stanton's colleagues felt at perfect liberty to speak out their opposition to the hostile movements of the South, and they all did it without concealment or hesitation. But Stanton was put by the Southern traitors under a *surveillance* so strict that he could not speak with a Senator except at midnight, by stealth, and in secrecy. At his own office it was impossible to see such visitors; the Southern eye was always on him. How did those traitors of the South manage to control *him* as they controlled nobody else? By what means did they "cow his better part of man," and master all his movements? What did they do, or threaten to do, which made him their slave to such a fearful extent? His relations with them must have been very peculiar. The suspicion is not easily resisted that he had his nocturnal meetings with Southern men also, and that he feared simply the discovery of his double dealing. This is what we must believe if we suppose that he really was shaken by unmanly terrors. But I confess my theory to be that he did not feel them, and that he made a pretence of them only that he might fool Mr. Sumner to the top of his bent. What does Mr. Sumner himself think? Was he, or was he not, the victim of a cruel humbug?

IV. Did Mr. Stanton conspire with the political enemies of the Administration to arrest Mr. Toucey on a false charge of treason? That such a conspiracy existed seems to be a fact established. What you say about it shows that you knew and approved it. Mr. Dawes and Mr. Howard were in it, and no doubt many others who have not confessed it themselves, or been named by you. But Mr. Stanton was not with you. The evidence of his complicity which you produce is altogether too indefinite, indirect, and obscure to convict him of so damning a crime. The enormous atrocity of the offence makes it impossible to believe in his guilt without the clearest and most indubitable proof.

Stanton and Toucey were at that time acting together in perfect harmony, closely united in support of the same general measures and principles. Toucey, at all events, was sincere; and Stanton knew him to be a just, upright, and honorable man, whose fidelity to the Union, the Constitution, and the laws was as firm as the foundation of the



everlasting hills. To Toucey himself, and to his friends, he never expressed any sentiment but esteem and respect, and he declared his confidence in him even to Mr. Seward, who was his enemy, as you yourself have taken the pains to prove. Was the destruction of this man one of the purposes for which the first law-officer of the Government sneaked about among your secret committees, met the plotters in their midnight lurking-places, employed a go-between to fetch and carry his clandestine messages, and, like a treacherous informer, wrote accusations which he trusted even to the hands of his confederates only while they were read in the light of a street-lamp?

There were two distinct and separate ways in which the conspirators could effect their designs upon the man whom they had marked out for their victim. One was to take him into custody under a legal warrant, regularly issued by a competent judicial officer. But to get such a warrant it was absolutely necessary that somebody should perjure himself, by swearing that Toucey *had levied war against the United States*. Was Stanton to make this false oath, in addition to the other proofs which he gave of his loyalty? Or was it expected that Peter H. Watson, who carried the charges, would swear to them also? If you did not rely on Stanton or Watson, was it you, or Mr. Dawes, or Mr. Howard—which of you—that meant to do the needful thing? Or was it intended that all three of you should entwine your consciences in the tender embrace of a joint affidavit? Or had you looked out for some common “man of Belial,” who was ready to be suborned for the occasion? No, no; you may have been eager to feed fat the ancient grudge you bore against Toucey for being a Democrat and a “Union-saver,” but none of you would have *sworn* that he was guilty of any criminal offense. Nor could Stanton or Watson have been persuaded to encounter such peril of soul and body. Nor could you, if you had tried your best, have found any other person to make the accusation in the form of a legal oath. The price of perjury was not then high enough in the Washington market to draw out from their hiding-places that swarm of godless wretches who afterward swore away the lives of men and women with such fearful alacrity.

From all this it is very clear that there was to be no swearing in the case, consequently no judicial warrant, and no lawful arrest. But Toucey *was* to be arrested. How? Of course in the only other way it could possibly be done. The conspirators intended to kidnap him. Mr. Dawes says that from the hour when the paper directing the arrest was read, under the street-lamp, and “went back to its hiding-place,” the Secretary was watched. The members of the committee, or the hirelings they employed, dogged his footsteps, and were ready to spring upon him whenever they got the signal. They could rush out as he passed the mouth of a dark alley, knock him down with their bludgeons, and drag him off. Or the lawless and “patriotic”



gang might burglariously break into his house in the night-time, and, impelled, as you would say, by "high and holy motives," take him by the throat and carry him away. After proceeding thus far, it would be necessary to dispose of him in some *private* dungeon (for you knew that the public prisons and forts could not then be prostituted to such base uses), where no friend could find him, and whence no complaint of his could reach the open air. Even in that case, "with all appliances and means to boot," his speedy liberation would be extremely probable, and the condign punishment of the malefactors almost certain, unless they acted upon the prudent maxim that "dead men tell no tales." The combination of Booth and others to kidnap Mr. Lincoln was precisely like this in its original object; and it was pursued step by step, until it ended in a most brutal murder. *Facilis descensus Averni.*

Was this a becoming business for Senators and Representatives to be engaged in? In that "hour of national agony," when hideous destruction stared the country in the face; when stout men held their breath in anxious dread; when the cry for relief came up to Congress on the wings of every wind; when the warning words of the President told you that the public safety required your instant attention—was that a time to be spent in prosecuting plots like this? I will not ask you to repent of the wickedness; it is not wrong in your eyes; it comes up to your best ideas of loyalty, patriotism, and high statesmanship. Your witnesses think of it as you do; they take pride and pleasure in their guilt, and wrap this garment of infamy about them with as much complacency as if it were a robe of imperial purple.

But was Stanton in it? Was the Attorney-General art and part in a foul conspiracy to kidnap the Secretary of the Navy, "his own familiar friend, his brother who trusted in him, and with whom he ate bread"? If he had sent the paper which was read under the street-lamp, why do you not produce it, or at least show by secondary evidence that it was in his handwriting? If Mr. Watson was the medium through whom he communicated his verbal directions to the committee or other persons confederated with him, why does not Mr. Watson appear and say so? To fasten this great guilt on Stanton will require evidence far better than Mr. Howard's small and silly talk about "a *bird* which flew directly from some Cabinet minister," and stronger than his *belief* founded on the fact that Stanton was a "suspicious character," especially as Mr. Howard admits his own participation in the crime, and is therefore something more than a "suspicious character" himself. But it is not merely the defects in the proof—it is the incredible nature of the story which counts against you. Stanton knew, if you did not, that the contemplated crime could not be perpetrated with impunity. Toucey breathed the deep



breath and slept the sound sleep of a freeman under the guardianship of a law which Stanton at that time did not dare to violate. A Democratic Administration still kept ward and watch over the liberty of the citizen. A vulgar tyranny which allowed abolitionists to do such things upon their political opponents was coming, but it had not come; the reign of the ruffian and kidnapper was drawing near, but it had not arrived; the golden age of the spy and the false accuser was beginning to dawn, but it had not yet risen.

You may think it some excuse for this false charge against Mr. Stanton that it is not much worse than others which you have proved to be true. But justice requires that even bad men shall suffer only for those misdeeds which they have actually done. One of the greatest among American jurists held a slander to be aggravated by proof that the victim's character was bad before; just as a corporal injury to a sick man or a cripple is a worse wrong than it would be to one of sound limbs and vigorous health.

V. Mr. Stanton's personal behavior and bearing in the Cabinet have been much misrepresented by others besides you. I am told that Mr. Seward described the supposed "scene" in some speech, which I have never read. It was given at length, and very circumstantially, in a London paper, over the signature of T. W.; Mr. Attorney-General Hoar, in a solemn oration which he pronounced before the Supreme Court last January, repeated it with sundry rhetorical embellishments; nearly all the newspapers of your party have garnished their pointless abuse of the Buchanan Administration with allusions to it more or less extended; and no doubt the book-makers in the service of the abolitionists have put it into what you call "contemporaneous history." So far as I have seen them, all these accounts differ from one another, and none is exactly, or even very nearly, like yours. But they agree in presenting a general picture of Mr. Stanton as engaged in some violent conflict which his colleagues were too dull, too unprincipled, or too timid to undertake, though some of them afterward plucked up heart enough to follow his lead. They declare that Stanton took the most perilous responsibilities, boldly faced the most frightful dangers, and with heroic courage fought a desperate fight against the most fearful odds; that the other members of the Cabinet looked on at the awful combat as mere spectators of his terrific valor, while the President was so frightened by the "fierce and fiery" encounter that all he could do was to "tremble and turn pale."

All this is (to use Stanton's own language) "a tissue of lies"; a mere cock and bull story; a naked invention, purely fabulous; a falsehood as gross and groundless as any in the autobiography of Baron Munchausen. Mr. Stanton was never exposed to any danger whatever while he was a member of that Cabinet; never had any occasion to exhibit his courage; never quarreled with any of his col-



leagues ; never denounced those he differed from, and never led those with whom he agreed. He expressed his dissent from the Southern members on several questions, but no man among us took better care than he did to avoid giving cause of personal offense. He acquired no ascendancy at the council-board, and claimed none ; he proposed no measure of his own, and when he spoke upon the measures originated by others, he presented no views that were new or at all startling. He and I never once differed on any question, great or small ; and this, though of course accidental, was still so noticeable that he said he was there only to give me two votes instead of one. He did not differ with Mr. Holt on any important question concerning the South more than once, and that was when the compact, afterward called a *truce*, about Fort Pickens was made. He must have agreed with the President when he agreed with Mr. Holt, for the latter gentleman declared most emphatically that the President *constantly* gave him a "firm and generous support." He never insulted the President. Mr. Buchanan knew how to maintain the dignity of his place, and enforce the respect due to himself, as well as any man that ever sat in that chair. It is most certain that Mr. Stanton always treated him with the profoundest deference. If he had been rash enough to take on the airs of a bully, or had ever made the least approach to the insolent rudeness for which you desire to credit him, he would instantly have lost his commission, and you would have lost your spy.

Among the versions which have been given of this false tale, yours is the most transparent absurdity ; for you give dates and circumstances which make it ridiculous. At a time when Floyd was in disgrace with the whole Administration—after all his brethren had broken with him, and he had been notified of the President's intention to remove him—when he was virtually out of office and completely stripped of all influence—Major Anderson removed his command from Fort Moultrie to Fort Sumter. You assert that Floyd, hearing of this, forthwith arraigned the President and Cabinet for the act of Major Anderson, declaring it to be a violation of *their* pledges, though it was not done by them, and they had given no pledge on the subject. That he could or would make an arraignment for any cause of the body by which he had himself just before been condemned is incredible ; that he would arraign it on such a charge is beyond the belief of any sane being. But such, by your account, was the occasion which Stanton took to display his superhuman courage. It was then that he armed his red right hand to execute his patriotic vengeance on that fallen, powerless, broken man. He must also have let fall at least a part of his horrible displeasure on the head of the President ; else why did the President "tremble and turn pale" ? I said this narrative of yours was mere *driveling*, and I think I paid it a flattering compliment.



But to explode the folly completely, I referred you to the record, which I said would show that Major Anderson acted in strict accordance with orders sent him through the War Department, of which Floyd himself was the head; and this you contradict. It is perfectly manifest that you examined the record, for you transcribe from it and print two telegrams exchanged between Floyd and Anderson *after the removal* of the latter took place. You saw on that same record the order *previously* given—the order on which Major Anderson was bound to act, and did act—and you have deliberately suppressed it. Nay, you go still further, and with the order before your eyes you substantially deny the existence of it. I copy for your especial benefit the words which relate to this point: “The smallness of your force (so say the instructions) will not permit you, perhaps, to occupy more than one of the three forts; but an attack, or an attempt to take possession of either one of them, will be regarded as an act of hostility, and *you may then put your command into either of them* which you may deem most proper to increase its power of resistance. You are *also authorized to take similar steps* whenever you have tangible evidence of a *design to proceed to a hostile act.*”

There is the order in plain English words. To make out your assertion it was necessary to conceal it, and you did conceal it from your readers. But that is not all. You find a telegram from Major Anderson, dated on the morning after the removal, in which he says simply that he has removed, but says nothing on the grounds on which he acted. On that same record, and right beside the telegram, you saw a letter from Major Anderson to the War Department, dated the same day, in which he *does* refer to his orders, and says, “Many things convinced me that the authorities of the State *designed to proceed to a hostile act,*” and then adds: “Under this impression I could not hesitate that it was my solemn *duty to move my command* from a fort which we could not probably have held longer than forty-eight or sixty hours to this one, where *my power of resistance is increased* to a very great degree.” You totally ignore this letter, in which Major Anderson justifies his removal in the very words of the order, and pick out a hasty telegram, in which nothing is said of his orders, for the purpose of proving that he acted without orders—an assumption which the record, if honestly cited, would show to be utterly false.

You will hardly venture to repeat your denial; for besides the original record there are thousands of authentic copies scattered over the nation, and anybody can find it in Ex. Doc. H. R., vol. vi, No. 26, page 10. I do not trust myself to make any general remarks on this glaring instance of mutilated evidence. You are a Senator, and I acknowledge the Scriptural obligation of a private citizen not



to "speak evil of dignities"; but of a dignity like you it is sometimes so difficult to speak well that my only refuge is silence.

You garble my words, so as to make them appear like a denial that Mr. Stanton ever wrote any letter at all on the subject of the "Cabinet scene," whereas I asserted that *no letter written by him would corroborate your version of it*. After coolly striking out from the sentence quoted the words which express my proposition, you proceed to contradict it by the statement of Mr. Holt, who says that a letter was written, but he *declines to say what was in it*.

I knew that Mr. Schell had addressed Mr. Stanton with the object of getting him to tell the truth and tear away the "tissue of lies" which so many hands had woven about this subject. If he answered at all, the presumption was that he would answer truly; and if he answered truly, instead of corroborating you, he must have denounced the whole story as a mere fabrication. Do you think now that, in the absence of all evidence showing or tending to show the contents of the letter, we ought to assume that Stanton filled it with bragging lies?

I do not mean to let this stand as a mere question of personal veracity between you and me, though I have the advantage, which you have not, of *knowing* whereof I affirm. But my denial throws the burden of proof upon you with its full weight. Recollect also that the strength of your evidence must be proportioned to the original improbability of the fact you seek to establish, and that the reasons *a priori* for disbelieving this fact are overwhelmingly strong. All presumptions are against the idea that a man who dodged about among the abolitionists as their spy, and vowed himself to the secessionists as their ally, and all the time manifested a dastardly dread of being discovered, would openly insult the President, or do anything else that was bold and violent. But you have taken the task of proving it; and how have you done it?

I certainly need not say that Mr. Holt proves nothing by writing a letter in which he declines to tell what he knows. His expressive silence, on the contrary, is very convincing that he knew the truth to be against you. As little, nay less, if less were possible, do you make out of his speech at Charleston. He deals there in glittering generalities, sonorous periods, and obscure allusions to some transaction of which he gives no definite idea, except that Stanton was *not* an actor in it, but a spectator; for he mentions him only to say that "he *looked* upon that scene." What the scene was he declared to be a secret, which history will perhaps never get a chance to record.

Failing wholly to get anything out of Mr. Holt, you naturally enough resorted to Mr. Dawes; and Mr. Dawes, willing, but unable to help you, called in the aid and comfort of his wife. "She," her husband says, "distinctly remembers hearing Stanton tell at our house the story of that terrible conflict in the Cabinet." That is the length



and breadth of her testimony. She remembers that Mr. Stanton told the story, but not the story itself. It was about a terrible conflict; but we do not learn who were engaged in it, who fell, or who was victorious—how the fray began, or how it ended—only it was terrible. Was Mr. Stanton the hero of his own story, or was he relating the adventures of somebody else to amuse or frighten the company? Mrs. Dawes is undoubtedly a lady of the very highest respectability; but, with all that, you will find it hard to convert the idle conversations at her house into history; and the difficulty is much increased by the fact that neither she nor anybody else is able to tell what they were.

The declaration of Mr. Holt that he would not reveal what he knew on this subject, and Mr. Dawes's statement that Mrs. Dawes told him that she heard Stanton tell something about it which she does not repeat, is *all the evidence you offer* on the point. Yet you affirm that this most improbable and slanderous story is not only true, but sustained by the "declarations of Mr. Stanton to credible witnesses, and the positive averments of Joseph Holt." Can this be mere ignorance? I am tempted to believe that you have gone about the business with a set purpose to make yourself ridiculous.

I fear very much that on this question, as on so many others, you have been guilty of a willful *suppressio veri*. Did you not know that Mr. Holt's testimony would be against you, when you took advantage of his scruples about giving it? Did not Mrs. Dawes recollect more than you have quoted? I may be wrong in this suspicion; but a man who mangles a public record must not complain if his good faith is doubted when he presents private evidence.

Mr. Attorney-General Hoar, believing this scandal to be true, tried in good faith to get the evidence which would prove it. When he found it to be false he passed over to you the letters which he had got in the course of his search, and you printed them. The lawyer was too honest to reassert a tale which he discovered to be unfounded; but the politician had not magnanimity enough to retract it; and therefore he let you burn your fingers where he would not put his own.

The story of a "Cabinet scene," as it floated about among irresponsible newsmongers, seemed for a while like a formidable slander; but you have made it utterly contemptible.

VII. A word before we part about the two hundred and fifty thousand dollars *raised* out of the Treasury for Governor Morton. Taking your account of that business as correct, I proved in my former letter that it was in the highest degree criminal. You left no escape from the conclusion that the parties were guilty of embezzlement under the act of 1846. Your narrative of the transaction impressed it with all the marks of what is called in the flash language of Washington "a big steal." You showed that the parties themselves so understood it at the time, for you put a conversation into their mouths by which

they are made to admit their liability to prosecution and imprisonment.

I saw plainly that this could not be true. Mr. Stanton's worst enemies never charged him with that kind of dishonesty, and Governor Morton had a reputation which placed him far above the suspicion of such baseness. Both of them may have had serious faults, but they would not rob the Treasury under any circumstances, or for any purpose. I asked three members of the Indiana delegation whether there was any foundation for your assertion ; they all answered no, and gave me the explanation which I used in my published letter.

Your replication to this point is one of the most astonishing parts of all your wonderful production. I denied that Messrs. Stanton and Morton had committed a felony, and gave a version of the affair which showed them both to be perfectly innocent. You grow ill-tempered and vituperative upon this, and charge me with "unconcealed, not to say ostentatious, malignity." I confess this is turning the tables upon me in a way I could not have expected. In general, the malignity is presumed against the party who makes an injurious charge, not against him who repels it.

There might have been some hope for you yet if you had recanted your first assertion, or admitted the errors of your statement, or made some effort to explain away the effect of it, by showing that you did not mean what you said. But you hold fast to every word of it ; not a syllable do you retract. On the contrary, you insist that it is *effrontery* in me to affirm that a debt was due to the State, and that it was paid according to law. What you say in your last, in addition to your first statement, makes the case look worse than it did before. But it is not true. The payment was not made on account of arms furnished to loyal citizens in rebellious States, nor was the money given to the Governor, to be disbursed by him on his own responsibility, as agent of the President. That much I can say on the official authority of the present Secretary of War, who wrote me on the 27th of last month that "the transaction appears to be based upon the *claims of the State of Indiana for expenses incurred in raising volunteers.*"

But Governor Morton is still above ground, and can take care of himself. If he *made a raise* out of the public Treasury without authority of law, and in defiance of the penal statutes in such case made and provided, he owes it to you to confess his guilt fully and freely. If he is innocent (as I believe him to be), it is due to himself and the memory of Mr. Stanton that he deny your allegations, and exhibit the true state of the facts, without delay.

The sum of the case, as it now stands, is this : Mr. Stanton put into the hands of Governor Morton, not a warrant as you say, but a requisition, on which the Governor got out of the Treasury two hun-



dred and fifty thousand dollars. If this requisition was based on a just claim, and drawn against a fund appropriated to the payment of it, the whole transaction was perfectly honest, exceedingly commonplace, and precisely similar to other acts done every day, before and since, by all the Secretaries—a simple discharge of routine duty, involving no responsibility whatever, no honor, and no blame. But it suited your ideas to glorify Stanton by declaring that he took the great responsibility of helping Mr. Morton to the money contrary to law, against the principles of common honesty, and in violation of his oath, thereby exposing both himself and his accomplice to the danger of prosecution and imprisonment in the penitentiary. This was the feather you stuck in his cap; for this you think him entitled to the “grateful admiration of his *loyal* countrymen.” I sought to deprive him of the decoration you bestowed on him, by showing that the money was paid according to law on a claim satisfactorily established, out of money regularly appropriated to that purpose. I tried to prove that it was not an embezzlement, and that there was nothing criminal in it. But this took the *loyalty* out of it, and left it without any merit in your eyes. Thereupon you fly into a passion and become abusive, which shows that your moral perceptions are very much distorted, and makes me fear, indeed, that you are altogether incorrigible.

This paper has grown much longer than I intended to make it, and I have no space for the exhortations I meant to give you in conclusion. I leave you, therefore, to your own reflections.

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#### OPEN LETTER TO GENERAL GARFIELD.

*To Hon. James A. Garfield, Member of Congress from Ohio:*

I HAVE read the speech you sent me. I am astonished and shocked. As the leader of your party, to whom the candidates have specially delegated the conduct of the pending campaign, you should have met your responsibilities in a very different way. I do not presume to lecture so distinguished a man upon his errors; but if I can prevent you, even to a small extent, from abusing the public credulity, it is my duty to try. Premising only my great anxiety to preserve the fraternal relations existing between us for many years, I follow the Horatian rule, and come at once to “the middle of things.”

You trace back the origin of present parties to the earliest immigrations at Plymouth and Jamestown, and profess to find in the opposing doctrines then planted, and afterward constantly cherished in Massachusetts and Virginia, the germs of those ideas which now make Democracy and Abolitionism the deadly foes of each other. The

ideas so planted in Massachusetts were, according to your account, the freedom and equality of all races, and the right and duty of every man to exercise his private judgment in politics as well as religion. On the other hand, you set forth as irreconcilably hostile the doctrine of Virginia, "that capital should own labor, that the negro had no rights of manhood, and that the white man might buy, own, and sell him and his offspring forever." Following these assertions with others, and linking the present with the long past, you employ the devices of your rhetoric to glorify the modern Abolitionist and to throw foul scorn, not merely on the Southern people, but on the whole Democracy of the country.

This looks learned and philosophical, and it gives your speech a dignity seemingly above the reach of the ordinary demagogue. Happy is he who knows the causes of things; felicitous is the partisan member of Congress whose stump-speech goes up the river of time to the first fountains of good and evil. But your contrast of historical facts is open to one objection, which I give you in a form as simple as possible when I say that it is wholly *destitute of truth*. This, of course, implies no imputation on your good faith. Your high character in the Church, as well as the State, forbids the belief that you would be guilty of willful misrepresentation.

The men of Massachusetts, so far from *planting* the right of private judgment, extirpated and utterly *extinguished* it, by means so cruel that no man of common humanity can think of them even now without disgust and indignation. I am surprised to find you ignorant of this. Did you never hear of the frightful persecutions they carried on systematically against Baptists, and Quakers, and Catholics?—how they fined, imprisoned, lashed, mutilated, enslaved, and banished everybody that claimed the right of free thought?—how they stripped the most virtuous and inoffensive women, and publicly whipped them on their naked backs, only for expressing their conscientious convictions? Have you never, in all your reading, met with the story of Roger Williams? For merely suggesting to the public authorities of the colony that no person ought to be punished on account of his honest opinions, he was driven into the woods and pursued ever afterward with a ferocity that put his own life and that of his friends in constant danger. In fact, the cruelty of their laws against the freedom of conscience, and the unfeeling rigor with which they were executed, made Massachusetts odious throughout the world.

These great crimes of the Pilgrim Fathers ought not to be cast up to their children; for some of their descendants (I hope a good majority) are high-principled and honest men, sincerely attached to the liberal institutions planted in the more southern latitudes of the continent. But if you are right in your assertion that the Abolitionists derive their principles from the ideas entertained and planted at



Plymouth, that may account for the coarse and brutal tyranny with which your party has, in recent times, trampled upon the rights of free thought and free speech.

Nor are you more accurate in your declaration that the old Yankees planted the doctrine of freedom and equality, or opposed the domination of one race over another. Messrs. Palfrey and Sumner have said something to the effect that slavery never existed in Massachusetts, and you may have been misled by them. But either they were wholly ignorant of the subject, or else they spoke with that loose and lavish unverity which is a common fault among men of their political sect. The Plymouth colony and the province of Massachusetts Bay were pro-slavery to the backbone. If you doubt this, I refer you to Moore's "History of Slavery in Massachusetts," where the evidence (consisting chiefly of records and documents perfectly authenticated) is produced and collated with a fullness and fairness which can not be questioned. The Plymouth immigrants planted precisely the doctrine which you ascribe to the Jamestown colonists—that is to say, they held "that the negro had no rights of manhood; that the white man might buy, own, and sell him and his offspring forever." Practically and theoretically, they maintained that human slavery, in its most unmitigated form, was a perfectly just, proper, and desirable institution, entirely consistent with Christianity as they understood it, and founded on principles of universal jurisprudence. They insisted upon it as an established and settled rule of the law of nations that when one government or community or political organization made war upon its own subjects, or the subjects of another, and vanquished them, the people of the beaten party had no rights to which the right of the conquerors was not paramount. Whenever it was demonstrated, by actual experiment, that any people were too weak to defend their homes and families against an invader who visited them with fire and sword, they might lawfully be stripped of their property, and they themselves, their wives, and their children might justly be held as slaves or sold into perpetual bondage. That was the idea they planted in their own soil, propagated among their contemporaries, and transmitted to the Abolition party of the present day. You have preached and practiced it in all your dealings with the South. This absolute domination is what you mean, if you mean anything, when you talk about the "precious results of the war." If the doctrine thus planted by the original settlers in Massachusetts be true, and if the "*precious fruits*" of it, which you are gathering with so much industry, be legitimate, it is a perfect justification of all the slavery that ever existed on this continent. Your great exemplars, from whom you acknowledge that you have derived your ideas of freedom, certainly thought, or professed to think, so, and they carried it out to its logical consequences. When an African potentate chose to fight with and subdue a weak tribe,



inside or out of his own dominions, he sold the prisoners whom he did not think proper to kill, and the men of Massachusetts bought them without a question of his title. They kept them and worked them to death, or sold them again, as their interest prompted ; for they held that the right of domination, resulting from the application of brute force, was good in the hands of all subsequent purchasers, however remote from the original *conquisitor*.

They executed this theory to its fullest extent in their own wars with the Indians. Without cause or provocation, and without notice or warning, they fell upon the Pequods, massacred many of them, and made slaves of the survivors, without distinction of age or sex. About seven hundred, including many women and children, were sent to the West Indies, and there sold on public account, the proceeds being put into the colonial treasury. Eight score of these unfortunate people escaped from the butchery by flight, and afterward agreed to give themselves up on a solemn promise of the authorities that they should neither be put to death nor enslaved. The promise was broken with as little remorse as a modern Abolitionist would violate his oath to support the Constitution. The "precious results of the war" were not to be lost by an honest observance of their pledged faith, and the victims of this infamous treachery were all of them shipped to the Barbadoes, and sold or "swapped for Blackamoors." This practice of enslaving their captives was uniform, covered all cases, and included women and children as well as fighting men. When death put King Philip beyond their reach, they sent his wife and child with the rest to be sold into slavery. The Indians made bad slaves. They were hard to tame, they escaped to the forest, and had to be hunted down, brought back and branded. They never ceased to be sullen and disobedient. The Africans always, on the contrary, "accepted the situation," were easily domesticated, and bore the yoke without murmuring. For that reason it became a settled rule of public and private economy in Massachusetts to exchange their worthless Indians for valuable negroes, cheating their West India customers in every trade. Perhaps it was here that your party got the *germ* of its honesty as well as its humanity. They made war for no other object than to supply themselves with subjects for this fraudulent traffic. In 1643 Emanuel Downing, the foremost lawyer in the colony, and a leader of commanding influence, as well as high connections, made a written argument in favor of a war with the Narragansetts. He did not pretend that any wrong had been done ; but he had a pious dread that Massachusetts would be held responsible for the false religion of the Narragansetts. "I doubt," says he, "if it be not synne in us, having power in our hands, to suffer them to maynteyne the worship of the devil which their powwows often doe." This tenderness of conscience for the sins of other people is very characteristic of the party which got



the "germ of its ideas" from that source. But go a little further, and you will see with pleasure how exactly you have copied their doctrines. This is the way Mr. Downing applies the motive power: "If," says he, "upon a just war, the Lord should deliver them into our hand, wee might easily have *men, women, and children* enough to *exchange* for Moors [negroes], which will be more gaynefull pilladge for us than wee conceive; for I do not see how wee can thrive untill we *get into a stock of slaves* sufficient to do all our business." This (except the spelling) might come from an abolition caucus to-day. You will find Downing's letter in Moore, page 10.

They did get most of their Indians off, and supplied themselves with negroes in their place. The shameless inhumanity with which the blacks were used made slavery in Massachusetts "the sum of all villainy." In the letter of Downing, already referred to, he says: "You know very well wee shall mayntayne twenty Moores cheaper than one Englishe servant." Think of reducing a West India negro in that intensely cold climate to the one twentieth part of the food and clothing which a white menial was in the habit of getting. They must have been frozen and starved to death in great numbers. When that happened it was but the loss of an *animal*. The harboring of a slave woman was, in 1646, pronounced by the highest authority to be the same injury as the unlawful detention of a *beast*. In 1716 Sewell, the Chief-Justice of the colony, said that negroes were rated with *horses* and *hogs*. Dr. Belknap tells us that afterward, when the stock enlarged and the market became dull, young negroes and mulattoes were sometimes given away like *puppies*. This is the kind of freedom, this the equality of the races, which you learned from the ancient colonists.

But they taught you more than that. Their precept and example established the slavery of white persons as well as Indians and negroes. As their remorseless tyranny spared no age and no sex, so it made no distinction of color. Besides the cargoes of white heretics which were captured and shipped to them by their brethren in England, they took special delight in fastening their yoke on all who were suspected of heterodoxy. One instance is worthy of special attention. Lawrence Southwick and his wife were Quakers, and accused at the same time with many others of attending Quaker meetings, or "syding with Quakers" and "absenting themselves from the publick ordinances." The Southwicks had previously suffered so much in their persons and estates from this kind of persecution, that they could no longer work or pay any more fines, and, therefore, the general court, by solemn resolution, ordered them to be banished on pain of death. Banishment, you will not fail to notice, was, in itself, equivalent to a lingering death, if the parties were poor and feeble; for it meant merely driving them into the wilderness to starve with hunger and cold.



Southwick and his wife went out and died very soon. But that is not all. This unfortunate pair had two children, a boy and a girl (Daniel and Provided), who, having healthy constitutions, would bring a good price in the slave-market. These children were taken from the parents and ordered to be sold in the West Indies. It happened, however, that there was not a shipmaster in any port of the colony who would consent to become the agent of their exportation and sale. The authorities, being thus balked in their views of the main chance, were fain to be satisfied in another way; they ordered the girl to be whipped; she was lashed accordingly, in company with several other Quaker ladies, and then committed to prison, to be further proceeded with. History loses sight of her there. No record shows whether they killed her or not.

This is one case out of a great many. It is very interesting and instructive when taken in connection with your speech; for it shows the "germ of the idea" which your party acted on when it kidnapped and imprisoned men and women by the thousands for believing in American liberty as guaranteed by the Constitution. The Quakers and Baptists had no printed organs in that day through which their private judgment could be expressed; else you would no doubt have cases directly in point to justify your forcible suppression of two hundred and fifty newspapers.

Enmity to the right of private judgment comes down to the party of Plymouth ideas by consistent and regular succession. It is woven like a dirty stripe into the whole warp and woof of their history. As soon as they got possession of the Federal Government, under John Adams, they began to use it as an engine for the suppression of free thought. Their alien law gave the President power to banish or imprison without trial any foreigner whose opinions might be obnoxious to his supporters. Their sedition law put every Democratic speaker and writer under the heel of the Administration. Their standing army was used, as it now is, to crush out their political opponents. If you come into Eastern Pennsylvania, and particularly into the good county of Berks, you will learn that the people there still think with indignation of that old reign of terror when Federal dragoons kidnapped, insulted, and beat their fathers, chopped down their "liberty-poles," broke to pieces the press of the "Reading Eagle," and whipped its venerated editor in the market-house. The same spirit broke out again in the burning of nunneries and churches under Maria Monk, and under John Brown the whole country swarmed with spies and kidnappers. When you abandoned the harlot and rallied to the standard of the thief, you changed your leader without changing your principles.

The slave code planted in Massachusetts was the earliest in America and the most cruel in all its provisions. It was pertinaciously adhered



to for generations, and never repented of, or formally repealed. It was gradually abandoned, not because it was wrong, but solely because it was found, after long experiment, to be unprofitable. Their plan of keeping twenty negroes as cheaply as one white servant did not work well; for in that climate a negro thus used would infallibly die before his labor paid what he cost. They sold their stock whenever they could, but emancipation was forbidden by law, unless the owner gave security to maintain the slave and prevent him from becoming a public charge. To evade this law, those who had old or infirm negroes encouraged them to bring suits for their freedom, and then by sham demurrers, or other collusive arrangements, got judgments against themselves that the negroes were free, and always had been. Females likely to increase the stock were advertised to be sold, "for that fault alone." Young ones, because they were not worth raising, were given away like puppies of a superabundant litter. In this way domestic slavery by degrees got loose in practice, simply because it would not pay; but the principle, on which one man may own another whom he subdues by superior strength or cunning, was never abandoned, repudiated, or denied. That principle was cherished, preserved, and transmitted to you, their imitative and loving disciples, and you have applied it wherever you could as tyrannically as they did.

You say that "war without an idea is simple brutality." I submit to your judgment, as a Christian man, whether war is redeemed of its brutality by such ideas as you and your political associates entertain of its purposes, objects, and consequences. In all your acts and measures, and by all your speeches and discussions, you express the idea that the logic of blows proves everything you choose to assert; that a successful invasion of one people by another has the effect of destroying all natural right to, and all legal guarantees for, the life, liberty, and property of the people so invaded and conquered; that after a trial by battle the victor may enter up and execute what judgment he pleases against his adversary; that the crime which a weak community are guilty of, when they attempt to defend their lives, their property, and their families against invaders who come upon them to kill, destroy, and subjugate them, is so unpardonable that the whole body of the offenders, taken collectively, and all individuals who partake even passively of the sin, may justly be devoted to death or such other punishment, by wholesale or retail, as the strong power shall see proper to inflict; that the conqueror, after the war is over, may insist that the helpless and unarmed people, whom he has prostrated, shall assist him by not merely *accepting*, but "adopting" (I use your own word) the measures intended to degrade and rob them, and thus make himself master of their souls as well as their bodies. All *rights* of men are resolved by this theory into the *mights* of men.

I aver that this doctrine, in all its length and breadth, is false and



pernicious. It is the foundation on which all slavery rests, and the excuse for all forms of tyranny. It has no support in any sound rule of public law, and has never been acknowledged by wise or virtuous governments in any age since the advent of Christ. You can find no authority for it, except in the examples of men whose names are given over to universal execration. Mohammed asserted it when he forced his religion upon the subjugated East, when churches were violently converted into mosques, and the emblem of Christianity was trampled under foot, to be replaced by the badge of the impostor. On the same principle Poland was partitioned, and Ireland plundered a dozen times. The King of Dahomey acted upon it when he sold his captives, and the men of Massachusetts indorsed it when they took them in exchange for captives of their own. You and your *confrères* adopted it as a part of your political creed when, after the Southern people were thoroughly subdued, you denied them all the rights of freemen, tore up their society, abrogated all laws which could protect them in person or property, broke their local governments in pieces, and put them under the domination of notorious thieves, whom you forced them to accept as their absolute masters.

These results of the war are no doubt very precious. The right to traffic in the flesh of Indians and negroes was precious to the Yankees and the King of Dahomey. That was the fruit of their wars. But was it in either case legitimate? Your great reverence for the founders of your political school in Massachusetts, to say nothing of your respect for the authority of the African princes, or your faith in the Koran, will probably impel you to stand up in favor of the "*ideas*" which you have learned from them. But I think I can maintain the Christian law of liberty in opposition to all your Mussulman notions; for God is great, and Mohammed is *not* his prophet.

It would be very unjust to deny that a great many men, from the earliest period of our history, were sincerely opposed to African slavery, from motives of religion, benevolence, and humanity. This sentiment was strong in the South, as well as the North, and by none was it expressed with more fervor than by Jefferson himself, the great apostle of Democracy. But this concession can hardly be made to the political abolitionists. As an almost universal rule, the leaders of that sect were ribald infidels, and their conventicles teemed with the most shocking blasphemy. They were, by their own avowals, the most cruel barbarians of any age. Servile insurrection and a general butchery of the Southern people were a part of their programme from the beginning. The leaders to whom they gave their highest admiration were the men whose feet were the swiftest in running to shed innocent blood. Seward won their affections in his early manhood by proposing measures from which civil war would be sure to come, and in which he promised that negroes should be incited to "rise in blackest



insurrection." They applauded John Brown to the echo for a series of the basest murders on record. They did not conceal their hostility to the Federal and State governments, nor deny their enmity to all laws which protected the liberties of white men. The Constitution stood in their way, and they cursed it bitterly; the Bible was quoted against them, and they reviled God the Almighty himself. I know that the mind of man, like his body, is fearfully and wonderfully made; I understand all the difficulty of analyzing human passions; and I admit that we should not judge harshly of motives: but how these heartless oppressors of their own race could have any care for the freedom of the negro passes my comprehension. Unless you can explain it otherwise, the judgment of history must inevitably be against the sincerity of their anti-slavery professions. In the present aspect of the case, it seems impossible to believe that love of the negro was not assumed as a mere excuse for enslaving the white race, just as their ancestors put on the pretense of piety to gratify their appetite for the property and blood of better people than themselves. You must positively reconsider this subject before you undertake again to present the abolitionists to the world in the respectable character of fanatics. I think you will find that the crew of the *Mayflower* brought over and planted no "germ of an idea" which has flourished with more vigor than their canting hypocrisy.

Here let me say again that the vices and wickedness of the Plymouth colonists are not to be visited on the heads of their children, according to the flesh. Among them, in every part of the country, are great statesmen, brave soldiers, true servants of the Church, and virtuous, patriotic Democrats, who are no more responsible for the crimes of their ancestors than a peaceable Scotchman is for the raids and robberies which in past generations were committed by his clan upon the English border. But you acknowledge that you get your political ideas from them; you boast that your party has no doctrines of public law, and no notions of public duty, which were not planted at Plymouth. Therefore it is not only proper, but necessary, to show what those doctrines and ideas were.

I pass now to a later period. You say that there were two radically different theories about the nature of our government—"the North believing and holding that we were a nation, the South insisting that we were only a confederation of sovereign States." It is not true that any such theoretical conflict ever existed between the sections. That the Articles of Confederation first, and the Constitution afterward, united the States together for certain purposes therein enumerated, and thus made us a nation among nations, was never denied that I know of by any party. But this national character was given to the General Government by sovereign States who confederated together for that purpose. They bestowed certain powers on the



new political corporation then created, and called it the United States of America, and they expressly reserved to themselves all the sovereign rights not granted in the charter. Democratic statesmen had no theory about it. They saw their duty written down in the fundamental law; they swore to perform it, and they kept their oaths. They executed the powers of the General Government in their whole constitutional vigor—for that, as Mr. Jefferson said, was “the sheet-anchor of our peace at home and our safety abroad”—and they carefully guarded the rights of the States as the only security we could have for a just administration of our domestic affairs. This was universally assented to as right and true. No counter theory was set up. Difference of construction there might be, but all admitted that when the line of power was accurately drawn between the Federal Government and State sovereignty, the rights on one side were as sacred as those on the other. But within two or three years last past the low demagogues of your party have got to putting in their platforms the assertion that this is a nation and not a confederation. What do they mean? What do you mean when you indorse and reproduce it? Do you deny that the States were sovereign before they united? Do you affirm that their sovereignty was wholly merged in the Federal Government when they assented to the Constitution? Is the tenth amendment a mere delusion? Do you mean to assert that the States have not now, and never had, any rights at all except what are conceded to them by the mercy of the “nation”? No doubt this new article was inserted in the creed of the abolitionists because they supposed it would give a sort of plausibility to their violent intervention with the internal affairs of the States. But it is so false, so shallow, and so destitute of all respectable authority, that it imposes upon nobody.

As a part of this conflict of theories, and resulting from it, you describe the South as “insisting that each State had a right, at its own discretion, to break the Union, and constantly threatening secession, where the full rights of slavery were not acknowledged.” In fact and in truth, secession, like slavery, was first *planted* in New England. There it grew and flourished, and spread its branches far over the land, long before it was thought of in the South, and long before “the full rights of slavery” were called in question by anybody. The anti-democrats of that region, in former as well as in later times, totally misunderstood the purposes for which this government was made.

They regarded it as a mere commercial machine, by which they could make much “gaynefull pilladge,” if allowed to run it their own way. When they were disappointed in this by certain perfectly just and constitutional regulations of their trade, which the common defense and general welfare made necessary, they immediately fell to plotting the dismemberment of the Union. Before 1807 they organ-



ized a conspiracy with the British authorities in Canada for the erection of New England into a separate republic under British protection. (See Carey's "Olive Branch" and the Henry correspondence.) Not long afterward Josiah Quincy, whose fidelity to the party which elected him was never doubted, formally announced in Congress the intention of his State to leave the Union, "peaceably if she could, forcibly if she must." Their hatred of the Union deepened, and their determination to break it up grew fiercer, as the resolution of the Democrats to maintain the independence of the country became stronger. When the war of 1812 began, they were virtually out of the Union, and remained out during the whole of that desperate struggle, not only refusing all assistance to carry it on, but helping the enemy in every possible way. It was while England had her tightest grasp on the throat of the nation, that the Hartford convention was called to dismember it; and this, Mr. Jefferson says, they would have accomplished but for the battle of New Orleans and the Peace of Ghent. John Quincy Adams in 1839, and Abraham Lincoln in 1847, made elaborate arguments in favor of the *legal right* of a State to go out. The later abolitionists did not attempt to conceal their rancorous hostility to the Union. "No union with slave-holders" was one of their watch-words, and, down to the opening of the war, its destruction was the avowed object of their machinations.

There is one conclusive proof of your enmity to the Union, and that is your unwavering opposition to the Constitution which held the States together. You know as well as I do how absurd it is to suppose that any man or party can support the Union, and at the same time trample on the Constitution; and you certainly are not ignorant that you and your predecessors, from the earliest times, have been anti-constitutional in all your proclivities. Contemptuous disregard of constitutional obligations is not now the mere germ of a doctrine; it is a part of your settled creed. Before the war and since, you have trodden under foot every provision contained in the great charter of our liberties. I do not speak at random. I challenge you to designate a single constitutional right of the States, or of individuals, which you have not at some time, or in some way, deliberately violated.

This contempt for the Constitution, this practical denial that an oath to support it is sacred, implies a disregard of all laws, human and divine, and, when adopted, it left nothing to guide you except the propensities, evil or good, of your natural hearts. Many of you (and notably you yourself) contracted no individual guilt, because you were too proud for petty larceny, too benevolent for large-handed robbery, and too full of kindness to break wantonly into the tabernacle of human life. But generally the moral principles of the ultra-abolitionists (if they ever had any) became so wholly perverted, that they saw nothing wrong in the worst offenses that could be committed against their



political opponents. In their eyes, theft and murder not only lost their felonious character, but became meritorious, if the victims lived south of Mason and Dixon's line. When John Brown stole horses in the peace of God and the State of Missouri, he was taking lawful booty; when he sneaked into a quiet Virginia village on a Sunday night and assassinated defenseless citizens, he was a hero; and when he died a felon's death on the scaffold, to which he was justly condemned, he became a martyr.

You persist in misunderstanding the ante-bellum attitude of the Northern Democracy. We stood steadfastly by the Union against all attempts of the New England party to break it up by secession. We sustained the Constitution against the ferocious assaults of the abolitionists; we labored earnestly to save republican institutions from the destruction with which they were threatened by you; and as long as the Southern people acted with us, we gratefully accepted their aid in the good work.

Your averment that the Democratic party desired the aggrandizement of slavery, and "yielded their consciences" on that subject to the South, is grossly unjust, if you mean to charge them with anything more than a willingness to protect the Southern as well as the Northern and Middle States in the exercise of their constitutional rights. We had disposed of slavery within our own jurisdiction according to our sense of sound policy and justice. But we had made an express compact with the other States to leave the entire control of their domestic affairs to themselves. We kept our covenant, simply because it would have been gross dishonesty to break it. The abolitionists took a different view, and refused to keep faith. They swore as solemnly as we did to observe the terms of the bargain; but according to their code it was a sin *not* to violate it. The fact is true that we did not think it right to cut the throats, or shoot, or strangle the men or women of the South for believing in negro slavery; but that is no justification of your assertion that we yielded our consciences to them.

Again: You charge us (the Northern Democracy) with having given bad advice to the Southern people. This consisted, you say, in assuring them that, if they seceded, we would take their part against any attempt to force them back again into the Union. This is a gross error, and you will see it when I recall your attention to the facts. In all our exhortations to Southern men against secession we were met by the expression of their fear that the abolitionists intended, in any event, to invade and slaughter them. Some reason for this apprehension was given by the fierce threats of your leading men, and especially by your almost universal admiration of Brown for his raid into Virginia. Certain Democrats (and very good men too) did then declare that a lawless expedition intended for purposes of mere murder



and pillage could not and should not be started in the North without such opposition as would effectually stop it. But this was before secession, and it was intended to prevent that movement, not to encourage it.

You can not, with any show of justice, deny that devotion to the Union was one of the strongest feelings in the heart of the Northern Democracy. We had always deprecated a separation from the Southern States with so much earnestness that one of the opprobrious epithets you bestowed on us was that of "Union savers." This was not a mere sentiment of admiration or gratitude to the great Southern men who had led us through the perils of the Revolution, settled our institutions, and given our country its high place in the estimation of the world. We felt all this! but we felt much more. The preservation of the Union was to us an absolute necessity. It was indispensable to the security of our lives, our personal liberty, and our plainest rights of property. How true this was at all times, and especially in 1860, you will see if you reflect a moment on our situation at that time.

The abolitionists were coming into power. I need not say by what combination of imposture and accident they got it. All the Northern States as well as the Federal Government fell into their hands. No doubt their dislike of Southern people was very great; but Northern Democrats were objects of their special malignity. Long before that time, and ever since, this sentiment has been expressed in words and acts too plain to be misunderstood. You show how strong it is in your own heart when you tell Southern men (and you do tell them so in this very speech) that you honor them ten thousand times more than Democrats of the North. Remember, in addition to this, that the leading abolitionists acknowledged no law which might stand in the way of their interests or their passions. Against anybody else the Constitution of the country would have been a protection. But they disregarded its limitations, and had no scruples about swearing to support it with a predetermination to violate it. We had been well warned by all the men best entitled to our confidence—particularly and eloquently warned by Mr. Clay and Mr. Webster—that if ever the abolitionists got a hold upon the organized physical force of the country, they would govern without law, scoff at the authority of the courts, and throw down all the defenses of civil liberty.

But if the South had not seceded, we might have made a successful defense of our Constitution though the powers of the Government were in the hands of its enemies. With the aid of the Southern people, if they had been true to their duty, we could have organized an opposition so formidable in its moral and political power that you would scarcely have dared to assault us. No wonder that we were "Union savers"; for to us the Union meant personal liberty, free thought, an independent press, *habeas corpus*, trial by jury, the impartial admin-



istration of justice—all those great legal institutions which our forefathers had shed so much of their blood to build up.

The South deserted us at the crisis of our fate, and left us in our weakness to the mercy of the most unprincipled tyrants that ever betrayed a public trust. Secession was not mere folly and madness; it was something much worse. We could not but feel that we were deeply wronged. There was no remedy for the dire calamities with which we were threatened except in bringing the seceded States back to their places in the Union. Our convictions of legal duty, our exasperated sense of injury, and a proper care for our best interests, all impelled us to join the new Administration in the use of such force as might be found necessary to execute the laws in every part of the country.

But the abolitionists wanted a war for the destruction of the Union, for the overthrow of the Constitution, for the subversion of free government, and for the subjugation of the whole country to that "higher law" which imposes no restraint upon the rapacity and malice of the ruling power. To such a war the national conscience was opposed. The soul of every respectable officer in the army and navy revolted at it, and every virtuous man in private life felt it to be an unspeakable outrage. To those who doubted before, the disaster at Bull Run made it plain that the war could not be successfully carried on unless it was put upon principles consistent with the usages of Christendom and the safety of our own institutions. Therefore it was that, on the 22d of July, 1861, Congress, with almost perfect unanimity, passed a resolution through both Houses, declaring, in the most explicit words, that the war should be conducted to preserve the Constitution, and not to revolutionize it. I give you here the words of the resolution itself from the "Congressional Globe," page 223 :

*"Resolved: That the present deplorable civil war has been forced upon the country by the disunionists of the Southern States, now in arms against the constitutional government, and in arms around the capital; that, in this national emergency, Congress, banishing all feeling of mere passion or resentment, will recollect only its duty to the whole country; that this war is not waged on their part in any spirit of oppression, or for any purpose of conquest or subjugation or purpose of overthrowing or interfering with the rights or established institutions of those States, but to defend and maintain the supremacy of the Constitution, and to preserve the Union with all the dignity, equality, and rights of the several States unimpaired; and that as soon as these objects are accomplished the war ought to cease."*

Confiding in this assurance, Democrats from every Northern State rushed to the front by the hundred thousand; the border States of the South gave in their formal adhesion to the Government; and our great military leaders drew their swords with alacrity in support of



the free institutions to which they had shown their fidelity so often before.

With what base perfidy this solemn pledge was broken I need not tell you ; for this speech shows that you know it well. You expressly declare that so far from sustaining the Government, you revolutionized it. Instead of a war for the Union, you claim that it put the States out of the Union, and you had a right to keep them out as long as you pleased, or admit them to their places on any terms, however degrading, which you choose to dictate. Instead of restoring the supremacy of the Constitution, all your politicians held, and, so far as I know from their public declarations, still hold, that the victory of the Federal forces abolished the Constitution, not only in the South, but in the North, and therefore they were not bound to observe its limitations, either in their legislative, judicial, or executive measures. Instead of bringing back the States with their rights unimpaired, according to your promise, you crippled, enslaved, subjugated, and disfranchised them. Instead of using the war power for the just and lawful purposes to which you were pledged, you converted it into a black Republican job to put the rights of all the people permanently under the feet of an unprincipled party.

I submit this part of the case to your consideration. I ask you to say whether you can find in the whole history of the human race another instance of similar perfidy on a scale so large. The baseness of the Massachusetts authorities in selling the surrendered Pequods into slavery, after a solemn promise to the contrary, was but the "germ of an idea," on which you acted in the fullness of its growth. Their act was, in its nature and character, nearly as bad as it could be, but only eight score of helpless people suffered by it ; the victims of your treachery are counted by millions.

The offenses which you are now engaged in committing upon the public treasury are the natural sequence of your crimes against popular liberty. Universal experience proves that power usurped will always be dishonestly used. Seeing that the abolitionists were led by men whom no oath could hold to the Constitution, and whom no pledge could bind to an observance of its principles, we had no right to expect a decent regard for justice in their administration of the national finances. I do not mean that the masses of your party were, or are now, destitute of common integrity. But that was overruled by the political doctrines of their leaders. Having once set aside the established law of the land, they had no standard by which they could measure the moral conduct of themselves or others, and they became incapable of seeing the difference between right and wrong in public affairs. The "higher law" threw the reins loose on the neck of all evil passions. It not only abrogated the Constitution, but the Decalogue as well, and the eighth commandment was nullified with the rest,

You have consequently made ours the corruptest Government on this side of Constantinople. Perhaps you will say this is a mere general assertion. But I am ready to maintain the truth of it against all opposers. You may take the rottenest monarchy in Europe, go over its history for a hundred years, and produce the worst act you can find of fraudulent spoliation upon its people; and if I do not show something worse committed here under the auspices of the party now in power I will give up the case.

I am speaking of the Government—of the officials who rule us for their pleasure, and plunder us for their personal profit—and it is no answer to quote Mr. Lord's speech before the Senate on the trial of Belknap. His eulogy was on the virtue and intelligence of the *people*, and he argued from that the duty of their servants to behave with integrity. He certainly did not mean to whitewash the administration. If he had meant to do so he could not have succeeded, for there was not wash enough in his bucket to go over the twenty thousandth part of the job.

While you were hunting for certificates of character among the speeches of the impeachment managers, why did you overlook that of Mr. Hoar? He said in effect (for I cite him from memory) that the one production in which our country excels all others in the world is the corruption of its Government. There was the testimony of a candid witness belonging to your own party, who knew whereof he affirmed and spoke directly to the point.

But it is useless to cite the evidence of individuals upon great public facts that are felt and seen and known of all men. Nothing ever was more notorious than the general disregard of all sound principle by this administration. No people on earth are now suffering so much from extravagant taxation, and nowhere does so small a portion of the taxes go to legitimate public purposes, or so much to the rulers themselves and the rings they choose to favor. Industry is crushed as it never was before. Labor no longer works for itself, since all and more than all of its surplus profits are exacted and consumed by the hangers-on of the Government. Now, although we call ourselves freemen or freedmen, we are to all intents and purposes slaves, so long as you continue to make us hand over to you the earnings of our labor; for the essence of slavery consists in compelling one man, or class of men, to work for another without equivalent. We are determined to relieve ourselves from this intolerable bondage, as far as we can legally and peaceably, and, if you do not help us, you must at least cease to mock us by pretending to be an anti-slavery man upon principle.

You tell us that the Republican party "will punish its own rascals." The newspaper report of your speech says that this was greeted with laughter from the Republican side of the House. Certainly it



sounds like the broadest of jokes. If you meant it in earnest, please to say what you found this claim of impartial justice upon. You will hardly prove it by showing that Bristow and Wilson succeeded, with much tribulation, in convicting certain manufacturers of crooked whisky, and thereby got themselves turned out of office. It is vain to deny that there is, and has been, a general *system* of dishonesty pervading all ranks of the civil service, which, so far from being punished, is protected, encouraged, and rewarded by the highest authorities. You have set your faces like a flint against all investigations tending to expose rascality. Proof of that, if proof were wanting, would be found in your own denunciation of the present Congress for pushing its inquiries into those regions where venality and corruption might otherwise have dwelt in safety.

In all your Southern measures you have shown a positive abhorrence of honest government. You forced into all places of power, men whose characters were notoriously bad, and maintained them while they perpetrated the most shameless robberies. You resisted every effort of the oppressed people to throw them off, and, when those efforts were successful in some of the States, you mourned the fall of the felons with sincere lamentation. Just look at the crew of godless wretches by whom Louisiana has been almost desolated ! In the face of a constitutional interdict, your administration at Washington repeatedly interfered to shield them from justice, and to uphold them in the possession of power to which they had no manner of legal claim. At this moment they are preying upon the prostrate people of the State, under the protection of Federal bayonets. Is that what you call punishing your own rascals ?

You may answer that the white people of Louisiana, being conquered, are rightfully enslaved, according to the principles planted at Plymouth, and therefore it is not for the like of them to invoke the protection of law and justice. I will therefore call your attention to another case to which the Dahomeian rule does not apply, and in which the failure of the Republican party to punish its own rascals has been equally signal ; I mean the frauds of the Union Pacific Railroad Company and the *Crédit Mobilier*.

You will pardon me, I am sure, for referring to this affair ; you are the last man upon whom I would make a personal point, and I could not do it here if I would try ; for the conviction I have often expressed remains unchanged, that your integrity was not stained by such connection as you had with that business. But we both know that it was the most gigantic fraud that the history of modern times discloses. The magnitude of the iniquity almost exceeds belief. The entire amount of the booty already taken from the public and stowed away in the pockets of the perpetrators can not be less than one hundred millions of dollars, and every six months they make a new de-



mand, which is honored at the treasury by an additional payment. I am told that a late Attorney-General counts *one hundred and eighty millions* as the sum which the United States will lose in solid cash, directly taken out of the treasury. I am not sure that this calculation is accurate, but it can not be very far wrong, and it is not equal to one half of the whole steal; for it does not include the value of the road itself, nor the land grants, nor the proceeds of the bonds to which the lien of the United States was postponed, nor the equipment bonds. As this swindle was the largest, so it was one of the most inexcusably base. It was perpetrated at a time when the nation was swamped with debt, when the people were loaded with taxes, and when the most rigid economy was imperatively required. All circumstances, as well as the direct evidence, show that it was no sudden act of thoughtless imprudence, but was willfully, deliberately, and corruptly prearranged and determined. There is nothing to mitigate it; you can not defend it even by waving the bloody shirt.

How did the Republican party "punish its own rascals" in this case? Not a hair on the head of any rascal was touched. On the contrary, they were promoted, honored, and advanced; the most guilty of them are now, as they were before, the very darlings of the party. Even that is not the worst of it. These swindlers are periodically swelling the colossal proportions of their crime by taking out of the treasury additional millions which they claim as the "precious results" of their original fraud. They have no better title to them than a wolf has to the mutton he slaughters by moonlight. The legal remedy against these exactions is so plain that ignorance alone could hardly miss it. But your officers have found out the way not to do it. They permit the Government to lie down and be robbed semi-annually, by a corporation which Tilden would long ago have disarmed of its power, and whose criminal abettors he would have swept into the penitentiary by scores.

I repeat that I do not blame you as an active accomplice in this wickedness. But you ought to have come out from the evil and corrupt fellowship as soon as you saw how evil and corrupt it was. You owed it to yourself, your Church, and your country, to break off at once from political associates capable of such indefensible conduct. But your acceptance of the doctrines planted at Plymouth by the Yankees blinded your judgment, and made your conscience inaccessible to the principles planted in Jerusalem by the "people first called Christians at Antioch."

You would have us believe that Hayes, if elected, will reform abuses and give us a pure administration. Your statement, and that of other gentlemen equally reliable, make it certain that Mr. Hayes bears an irreproachable character in all his private relations. I do not doubt his possession of that negative honesty which it is a disgrace to



want. I accord him those tame household virtues which entitle him to the respect of his neighbors and the confidence of his family ; but he can no more stem the torrent of Republican corruption than he can swim against the rapids of Niagara. His whole history shows that he would not even make an effort to do so. He has been most happily called "a man of tried subserviency."

A reformer in these times must be made of stern material. He must have no connection with, and be under no obligation to, the authors of the abuses which need reform. Above all things, he must not have consented, expressly or impliedly, to the commission of the public wrongs which his duty as a reformer would require him to punish. When he comes to oppose wickedness in high places, the consciousness that he himself is *in pari delicto* will make even a strong man as nerveless as infancy.

To show how hard it would be for a man like Mr. Hayes to resist the worst orders of his own party, I will cite a case directly in point, and certainly within your recollection as well as mine.

In the case of Milligan, you made an eloquent and powerful speech before the Supreme Court for those free principles which I, at the same time, supported in my weaker way. You showed the indestructible right of every citizen to a legal trial ; you proved that *Magna Charta* did not perish on the battle-field ; you demonstrated by irresistible logic that the Constitution was supreme after the war as it was before ; you spurned with lofty contempt the brutal idea that law was extinguished by the victory of the forces called out to defend it ; and you closed with that grand peroration on the goddess of Liberty, which, if spoken at Athens in the best days of her "fierce Democratic," would have "shook the arsenal and fulminated over Greece." These were not the words of a paid advocate, for you had volunteered in the cause ; nor the sudden emotions of a neophyte, for you had read and pondered the subject well. You spoke the deliberate conclusions of your mind, and there is no doubt that in your heart of hearts you believe them to be true this day.

Yet when the reconstruction law was proposed, you suffered yourself to be whipped in, surrendered your conscience to your party, and voted against your recorded convictions, for a measure that nullified every provision of the Constitution, whereby ten millions of people were deprived of rights which you knew to be sacred and inalienable.

If this was your case, what subserviency may not be expected from Mr. Hayes, when the party lash comes to be laid on *his* back ? You are his superior in every quality that holds a man true to public duty. You have been carefully schooled in the morality of the New Testament, you have lived all your life in the full blaze of the gospel, you are gifted with a logical acumen which few can boast, and with moral courage far above the average. If you fell down before the Moloch of

abolitionism, and gave up all principle at once, what act of worship will Hayes deny to that grim idol ?

Speaking of reconstruction, and seeing your broad accusations of treason, I am tempted to ask if you are sure that you yourself and your associates did not commit that crime.

In March, 1867, the then existing Government of the Union was supreme all over the country, and every State had a separate government of its own for the administration of its domestic concerns. That Government was entitled then, if it ever was, to the universal obedience of all citizens, and you, its officers, had taken a special oath of fidelity to it. Nevertheless, you made a deliberate arrangement not only to withdraw your support from it, but to overthrow it totally in ten of the States ; and this you did *by military force*. In all the South you *levied war* against the nation and against the defenseless States, destroyed the free governments of both, and substituted in their place an untempered and absolute despotism.

Now, suppose you had been indicted for this : how could you have escaped the condemnation of the law ? I know your excuses, and I can understand your claims to mercy ; but what *legal* defense could you have made consistent with your own argument and the decision of the court in the Milligan case ?

I can not describe to you how unpleasant is the sensation produced by your professions of a desire for peace. Why do you not give us peace if you are willing we shall have it ? You need but to cease hostilities, and the general tranquillity will be restored. You refuse to do that because peace would endanger your party ascendancy. To maintain your plunderers in power, you have uniformly resorted to the bayonet ; you have made civil war the chronic condition of the country ; wherever you could you have displaced liberty, fraternity, and equality, and given nothing instead but infantry, artillery, and cavalry. You are at this moment openly engaged in preparing your battalions for armed intervention in the struggle of the people with the carpet-baggers.

What makes this worse is your closing declaration that you will take no step backward. There is to be no repentance, no change of policy, and consequently no peaceful or honest government. "Onward" you say is the word. Onward—to what ? To more war, more plunder, more oppression, more universal bankruptcy, heavier taxes, and still worse frauds on the public treasury ?

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## THE GREAT FRAUD.

"Thou hast it now, King, Cawdor, Glamis, all  
As the weird women promised, and I fear  
Thou play'dst most foully for't."

SINCE the first formation of what Washington called "our happy system of government," no event not accompanied with violence or war has excited a feeling so intense as the act of "counting in Hayes." But the public men of the country, and the people generally, are far from being agreed about its character or its probable effect in the future.

Democrats, who knew Mr. Tilden to be elected by an overwhelming majority, both of the popular vote and of the electors duly appointed, were transported with passionate indignation when they saw his defeated competitor lifted over his head by a series of manœuvres which they thought alike incompatible with honesty and law. In every part of the country, by the press, from the rostrum, and in the halls of Congress, the charge of base and unmitigated fraud was thundered into the ear of the world. Some, who indulged in no vehemence of oburgation or reproach, were bowed down with shame at the thought that their proud right as American citizens, of electing a ruler for themselves, had been taken out of their hands by a trick, and transferred to a set of low conspirators, whom they could not help but hold in utter detestation. All that once ennobled the nation seemed to be buried in this deep grave, dug by the Returning Board and filled up by the Electoral Commission.

But the voice of lamentation proves nothing; neither does the wrath which "cleaves the general ear with horrid speech": for both are the natural utterances of a defeated party, especially when the defeat comes unexpectedly, after victory was assured, and in ways not foreseen. There is another side to the case.

The men who did this deed will not admit it to have been wrong, or let judgment of condemnation go by default. Some misgivings there may have been here and there; but nearly all zealous Republicans saw it with unreserved approbation. Not only the herd of low politicians, who always ramp and swear and bluster on the winning side, but high-placed gentlemen of good character heard the announcement with pleasure, that what we call the Louisiana swindle was too sacred a thing to be questioned. The decision was hailed by Christian statesmen with loud benedictions. On Sunday, the 4th of March, pious Republicans assembled themselves together in prayer-meetings, and simultaneously sent up to heaven the most fervent petitions that God would bless the Returning Boards and the Electoral Commission, sanctify the work of their hands, and prosper the pseudo President

whom they had placed in power. Elsewhere the party demonstrated its pleasure by firing off a large number of great guns. In some places the admiring people gathered in gay and festive crowds, and drank deep potations to the defeat of Tilden's big majority, while Bradley and Kellogg, Chandler and Packard, Wells, Anderson, and the two mulattoes, were "in their flowing cups freshly remembered." In both houses of Congress the representatives of the party to whom Mr. Hayes belonged stood square and solid in defense of his title. They heard the imputation of dishonesty upon themselves and their fellow-partisans with no sign of shame or fear. On the contrary, "hope elevated and joy brightened their crests," as they saw the imposture progress step by step to its consummation. Two members from Massachusetts were troubled with scruples, and one from Florida denounced the fraud which elected himself as well as Hayes; but this could scarcely be said to break the unanimity of the party. Since the close of the session they have seemed to enjoy their triumph mightily, and the applause of their beloved constituents has not been wanting to increase their self-satisfaction.

It is very manifest from all this that the party calling itself Republican differs *toto cælo* from the Democratic view of the subject. Republicans believe either that no fraud has been committed, or else that a fraud by which they profited was a fit and proper thing for them to do. Whichsoever of these positions they take, a question is raised which demands fair, full, and free discussion, so that truth may prevail and justice be done. If the organs and representatives of the Democracy have merely raised a false and malicious clamor against their opponents, they deserve the severest reprehension that the censure of the world can visit upon them; they should be deprived of all political influence, and no share in public business, local or national, should ever again be trusted to their control. On the other hand, if it be true that we have an administration of the General Government which is not the result of an honest election, but the mere spawn of a corrupt conspiracy, then popular liberty has been deeply, perhaps fatally, injured, and all who aided in the crime, all who gave comfort to the criminals, and all who knowingly partook of the iniquity by receiving its wages, ought to be, and in the fullness of time they undoubtedly will be, classed among the worst malefactors of the age.

The prominent and well-known facts of the case, set forth in the plain style of simple narration, will show whether the count was honest, and, if not honest, whether any excuse can be found for its falseness. But to make this more intelligible, it is necessary to remind the reader of certain points in our political history which have within the last twenty years divided the two parties and defined their antagonism.

The powers of the Federal Government, the rights of the States,



and the liberties of the people—these constitute the essential parts of the system to which our fathers set the seal of their wisdom and virtue. This trinity of political forces, so harmoniously adjusted that each gave strength to the others, did indeed seem to make a Government as nearly perfect as possible. Each was a *vital* part; the “*life* of the nation” depended upon the preservation of one as much as the other; the Government (using the word in its true American sense) would as certainly be destroyed by the overthrow of popular liberty, or the subjugation of the States, as by successful resistance to Federal authority.

These notions of fidelity to the whole of the Government, and every part of it, placed the Democracy, during the civil war, in the most difficult attitude that can be conceived. They were obliged to fight secession, and fight it with the sword, if nothing else would do; for to them rebellion against the lawful authority of the United States was “as the sin of witchcraft.” At the same time the best convictions of their hearts impelled them to defend their individual rights of life, liberty, and property, which were most wantonly and unjustly assailed by the abolitionists. Seeing their institutions attacked on both flanks at once by different enemies, most of them thought it best to simplify their duty by postponing their resistance to one until the other was conquered. They hoped that, when the Union was restored, the Constitution would be allowed to reassume its supremacy without further opposition. This hope was founded on very solemn declarations by the President (Lincoln) that he was a true friend of the Constitution, and meant no war except purely in defense of the United States. Besides, Congress, by a vote nearly unanimous in both houses, assured the country that the war had not any revolutionary purpose whatever, but should be conducted solely to enforce the laws, and to maintain the supremacy of the Federal Constitution, with all the rights of the States unimpaired.

All these pledges were most perfidiously broken. The ultra-abolitionists, at the close of the war, had a two thirds majority in Congress, and could do what they pleased. They refused to keep faith. They insisted that the Government was revolutionized; that State rights had ceased to be; that personal liberty in the Southern States had been extinguished; that the people of the South, being conquered, bore to the conquerors no legal relation except that which existed between the King of Dahomey and the Guinea negroes whom he captured and sold; that they might be governed without law, and especially without regard to that fundamental law which the legislators were sworn to observe in all their acts. The Constitution, instead of being defended, had been shot to death on the battle-field. It was dead, and could not be pleaded to protect the weak, or restrain the evil passions of the strong party.



Upon this principle the Reconstruction Act of 1867 was based. It was simply a slave-code. Not one provision of the Constitution was left unviolated; all the rights which our forefathers, on this or the other side of the Atlantic, shed their blood to maintain, were insultingly overborne. If the Constitution still lived, this act of Congress was a gross breach of the oath which the members had taken to support it; if we suppose it dead, the act was a most indecent outrage on its corpse.

For a time the Southern people lived at the mercy of the military officers who were sent to keep the yoke tight upon their necks. Most of these, being gentlemen of honor and humanity, they did the work of oppression reluctantly, and sometimes failed altogether. General Hancock, for instance, startled the authorities at Washington by a published letter in favor of civil liberty. It became plain that this "sabré sway" would not last long nor be perfectly effectual while it continued. The divine right of the negro to govern the white man was then asserted, and his ascendancy secured, by the Fifteenth Amendment, in the confident hope that his ballot would be a more effectual instrument of tyranny than the soldier's bullet.

The people would not have been wholly crushed, either by the soldier or the negro, if both had not been used to fasten upon them the domination of another class of persons, whose rule was altogether unendurable. These we call *carpet-baggers*, not because the word is descriptive or euphonious, but because they have no other name whereby they are known among the children of men. They were unprincipled adventurers, who sought their fortunes in the South by plundering the disarmed and defenseless people; some of them were the dregs of the Federal army—the meanest of the camp-followers; many were fugitives from Northern justice; the best of them were those who went down after the peace, ready for any deed of shame that was safe and profitable. These, combining with a few treacherous "scalawags," and some leading negroes to serve as decoys for the rest, and backed by the power of the General Government, became the strongest body of thieves that ever pillaged a people. Their moral grade was far lower, and yet they were much more powerful, than the robber-bands that infested Germany after the close of the Thirty Years' War. They swarmed over all the States from the Potomac to the Gulf, and settled in hordes, not with intent to remain there, but merely to feed on the substance of a prostrate and defenseless people. They took whatever came within their reach, intruded themselves into all private corporations, assumed the functions of all offices, including the courts of justice, and in many places they even "run the churches." By force and fraud they either controlled all elections or else prevented elections from being held. They returned sixty of themselves to one Congress, and ten or twelve of the most ignorant and venal among them were at



the same time thrust into the Senate. This false representation of a people by strangers and enemies, who had not even a *bona fide* residence among them, was the bitterest of all mockeries. There was no show of truth or honor about it. The pretended representative was always ready to vote for any measure that would oppress and enslave his so-called constituents; his hostility was unconcealed, and he lost no opportunity to do them injury.

Under all these wrongs and indignities the Caucasian men of the South were prudent, if not patient. No brave people accustomed to be free ever endured oppression so peacefully or so wisely. The Irish, with less provocation, were in a state of perpetual turbulence; the Poles were always conspiring against the milder rule of their Russian masters: but Southern men "made haste slowly" to recover their liberties. They could not break the shackles of usurped control, but some of the links gradually rusted and fell away of themselves. The gross impolicy of desolating the fairest half of the country impressed itself more and more on the Northern mind; the mere expense, in money, of maintaining this vulgar tyranny became disgusting. The negroes gradually opened their eyes to the truth that they were as badly imposed upon as the whites. With consummate skill the natural leaders of the people hoarded every fresh acquisition of self-governing power. State after State deposed its corrupt Governor, by impeachment or otherwise, and brought its official criminals to justice, until all were redeemed except Florida, South Carolina, and Louisiana. A more particular look at the condition of the last-named State is needed, because it was the principal theatre of the "Great Fraud."

The agricultural and commercial wealth of Louisiana made her a strong temptation to the carpet-baggers. Those vultures snuffed the prey from afar; and, as soon as the war was over, they swooped down upon her in flocks that darkened the air. The State was delivered into their hands by the military authorities, but the officers imposed some restraints upon their lawless cupidity. They hailed with delight the advent of negro suffrage, because to them it was merely a legalized method of stuffing the ballot-box—and they stuffed it. Thenceforth, and down to a very recent period, they gorged themselves without let or hindrance.

The depredations they committed were frightful. They appropriated, on one pretense and another, whatever they could lay their hands on, and then pledged to themselves the credit of the State for uncounted millions more. The public securities ran down to half-price, and still they put their fraudulent bonds on the market and sold them for what they would fetch. The owners of the best real estate, in town or country, were utterly impoverished, because the burdens upon it were heavier than the rents would discharge. During the last ten years the city of New Orleans paid, in the form of direct taxes, more



than the estimated value of all the property within her limits, and still has a debt of equal amount unpaid. It is not likely that other parts of the State suffered less. The extent of their spoliations can hardly be calculated, but the testimony of the carpet-baggers themselves against one another, the reports of committees sent by Congress to investigate the subject, and other information from sources entirely authentic, make it safe to say that a general conflagration, sweeping over all the State from one end to the other, and destroying every building and every article of personal property, would have been a visitation of mercy in comparison to the curse of such a government. This may seem at first blush like gross exaggeration, because it is worse than anything that misrule ever did before. The greediest of Roman proconsuls left something to the provinces they wasted; the Norman did not strip the Saxon quite to the skin; the Puritans under Cromwell did not utterly desolate Ireland. Their rapacity was confined to the visible things which they could presently handle and use. They could not take what did not exist. But the American carpet-bagger has an invention unknown to those old-fashioned robbers, which increases his stealing power as much as the steam-engine adds to the mechanical force of mere natural muscles. He makes negotiable bonds of the State, signs and seals them "according to the forms of law," sells them, converts the proceeds to his own use, and then defies justice "to go behind the returns." By this device his felonious fingers are made long enough to reach into the pockets of posterity; he lays his lien on property yet uncreated; he anticipates the labor of coming ages and appropriates the fruits of it in advance; he coins the industry of future generations into cash, and snatches the inheritance from children whose fathers are unborn. Projecting his cheat forward by this contrivance and operating laterally at the same time, he gathers an amount of plunder which no country in the world would have yielded to the Goth or the Vandal.

While the carpet-baggers in the executive offices and the legislature, assisted by Federal agents, were making enormous "piles" and plotting for more, petty larceny reigned supreme in the rural parishes. The negroes knew nothing of the difference between *meum* and *tuum*, and the law which should have taught them was a dead letter; every portable thing which could not be kept under lock and key—pigs, poultry, the fruits of the garden and orchard—were stolen as fast as they were fit for use, insomuch that the production of them had to be given up, greatly to the distress of all industrious and honest persons. Even the heavier crops, such as cotton and corn, were carried away from the fields at night, and traded for liquor and groceries at "stores" which were established for that particular branch of internal commerce.

Security of life can never be counted on where property is not protected; when the public authorities wink upon theft, the people are



driven by stress of sheer necessity to defend themselves the best way they can, and that defense is apt to be aggressively violent. Justice, infuriated by popular passion, often comes to its victims in a fearful shape. Disorders, therefore, there must have been, and bloodshed and violence, and loss of life, though they are not enumerated or clearly described in the reports. It is known that bands of "regulators" traversed many parts of the State, and the fact is established that seven of the storehouses used as places of receiving stolen goods were burned to the ground in one night. The officers of the carpet-bag government "cared for none of these things." They saw the struggle between larceny and Lynch-law with as much indifference as Gallio looked upon the controversy between the Jewish synagogue and the Christian church at Ephesus. This horrible condition of society was caused solely by the want of an honest government.

But this is not nearly the worst of it, if carpet-baggers themselves and their special friends are worthy of any credence at all. They testify to numerous other murders, wanton, unprovoked, and atrocious, committed with impunity under the very eyes of their government. General Sheridan says he *collected* a list of *four thousand* assassinations perpetrated within *three years*. Senator Sherman and his associates of the visiting committee swell this number greatly, and add that "*half the State was overrun with violence.*" No effort was made to repress these disorders or punish the criminals. Nobody was hung, nobody tried, nobody arrested. The murderers ran at large; the victims fell at the awful average of about four every day, and the public officers quietly assented to let "the rifle, the knife, the pistol, and the rope do their horrid work" without interruption. Are such men fit to govern a free State? "Fit to govern! No, not to live."

If an officer, whose duty it is to bring a felon to justice, connives at his escape, or willfully allows him to go free, he becomes an accessory after the fact, and by all civilized codes his offense is as great as that of the principal. Certainly such an officer is morally responsible to God and man for a murder which he, by the exercise of his proper functions, might have prevented, but did not. Apply this rule to the Louisiana carpet-baggers, and measure the depth of their iniquity.

There is an aggravation of it, in the fact stated by Mr. Sherman, that most of these murders were done upon negroes, many of them females, and some of them mere children. The carpet-baggers professed to be the special friends and protectors of the African race; yet they permitted them to be slaughtered by thousands with quiet unconcern, not lifting a finger to stay the wholesale destruction of their lives.

Is there any mitigation of the terrible guilt thus imputed to them by their friends? Some of their advocates say they were too *weak* to maintain public order, and were *afraid* even to try. This will not do; for imbecility or cowardice in such circumstances is as bad as



willful default. A magistrate who says he *can not* punish or prevent continued murder is himself a murderer unless he gives place to somebody else who *can*. But in truth the carpet-baggers did not lack strength; and no courage was required. Legal process was never opposed; the great body of the people were on the side of law and order; in every parish the sheriff could raise an irresistible *posse*; the aid of the United States Marshal, with thousands of willing and well-paid deputies, could always be commanded; the State had the largest police force in America; and at the back of all, "leashed in like hounds," the solid battalions of the Federal army "crouched for employment."

But let us be just. Kellogg and his confederates do not deserve all this infamy. The story of four thousand murders is part of the *Great Fraud*, and was fabricated to serve as an excuse for the false count. The heads of the administration at Washington may properly be called its creators, for they said, "Let it be made, and it was made." The theory was that murder and violence, which the carpet-bag officers were too weak or too wicked to stop, gave them a paramount claim to the perpetual continuance of their disorderly rule, and that therefore the votes of a popular majority against them or their candidates for Governor and President ought not to be counted. Acting upon this view, they made up for the then existing government of Louisiana the "bloodiest record on the page of time," and used it on all occasions as a standing answer to every demand for an honest count of the votes legally polled. That this was the predetermined intent as well as the actual use of it is very apparent. General Sheridan accompanied his statement with a proposition, not only to disfranchise certain political organizations opposed to the carpet-baggers, but to outlaw them as banditti, and leave them to be shot and strangled by the soldiery under his orders; and the Secretary of War assured him that his course was highly approved by the President and all his Cabinet.\* Senator Sherman and his visiting committee, after giving a most revolting account of the cruelty, bloodshed, and violence practiced under the carpet-bag government, conclude that if the people, by their majority already recorded, shall prevail against it and its presidential candidate, "then shall the glories of the Republic have departed." Senator Morton, speaking from the bench of the Electoral Commission, drew his strongest argument for a false count from the murders perpetrated under carpet-bag auspices. Senator Howe, of Wisconsin, advocating the fraud, went minutely into the history of many unpunished homicides; he smeared and daubed the Kellogg govern-

\* This dispatch was hastily written by the Secretary of War, who, without intending it, did great injustice to a part of the Cabinet. We have the authority of General Belknap himself for saying that Mr. Fish and Mr. Bristow indignantly protested against General Sheridan's atrocious proposition.



ment with innocent blood, and pronounced it eminently "*respectable*." Nearly all the lesser lights took the same line of argument. It was a grievous wrong against the carpet-baggers to weave this bloody stripe into the web of their history, which was bad enough without that; but to set it up as a reason for disfranchising the people who vote against a government so stained seems like a new species of moral insanity.

To parade acts of violence and murder perpetrated within the jurisdiction of a carpet-bag government was called, in the flash language of the politicians, "waving the bloody shirt," and considered a most effective mode of electioneering. A bloody shirt of their own, always ready to be waved, was a great merit; and they "assumed the virtue, though they had it not." It was proved before Mr. Morrison's committee that a homicide story, which included the death of a black person, was thought, by some Republicans, to be as good for the party as fifty thousand dollars added to its campaign fund.\* According to this valuation, Sheridan's collection of four thousand was worth two hundred millions of dollars. The carpet-bag officers did not object to the fictitious account of their own bloody baseness; for it was intended to keep them in their places; and if it had that effect, they were content to be infamous. But how the great leading statesmen of the country ever came to adopt the idea that the wickedness they charged upon the carpet-baggers would, if true, be a just ground for depriving the people of the right to vote them out, is one of the mysteries which may possibly be solved hereafter; but with the lights we have now it is wholly incomprehensible.

The wretched system of carpet-bag government could not possibly last. From the first it had no real support. The native people and the honest immigrants, who went there for purposes of legitimate business, held it in abhorrence, and the negroes were not long in finding out that it was a sham and a snare. As early as 1870, and before that, the handwriting was seen on the wall which announced that a large and decisive majority of all the votes, black and white, had determined to break up this den of thieves. They must therefore prepare for flight or punishment, unless they could contrive a way of defeating the popular will whenever and however it should be expressed. Then the *Returning Board* was invented.

This was a machine entirely new, with powers never before given to any tribunal in any State. Its object was not to *return*, but to *suppress*, the votes of the qualified electors, or change them to suit the occasion. By the terms of the law it can exclude, suppress, annihilate, all the votes of a parish for violence, intimidation, or fraud, which it finds to have been committed and adjudges to have materially influenced the result of the poll. This is judicial authority so broad

\* Report of Mr. Morrison's Louisiana Committee, February 1, 1877, p. 14.



that no court would consent to exercise it—inflicting the fearful penalty of disfranchisement upon thousands at once, without a hearing and without legal evidence, not for any offense of their own, but for the supposed sin of others over whom they confessedly have no control. Of course, it is in direct conflict with the State Constitution, which declares that all judicial power shall be vested in certain ordained and established courts, and forbids it to be used even by them, except upon trial before a jury, and conviction on the testimony of credible witnesses confronted by the accused and cross-examined by counsel. It is, besides, a most insolent affront to the fundamental principles of all elective government, for it makes the poll of the people a mere mockery, which decides nothing except what the Returning Board is pleased to approve, and elects nobody whom the Returning Board does not graciously favor. Its power to veto a popular vote extends to all elections, for every class of officers, judicial, legislative, ministerial, and executive, including electors of President and Vice-President.

All men will agree that when violence, fraud, intimidation, etc., occur at an election, some action ought to be taken upon it to bring the offenders to justice. But this law requires that the election officers report the fact, not to the judicial authorities of the State, in order that the guilty parties may be tried and punished, but to the Returning Board, so that it may impose the penalty of disfranchisement upon innocent citizens without trial. The slightest consideration of this one provision shows that the Returning Board law had no honest purpose, that it "was conceived in sin and brought forth in iniquity," and that its object was to cheat from the beginning.

No man with sense enough to know his right hand from his left will need to be told that a monstrous thing like this can not be constitutionally fastened upon a free State. A government that makes it one of its institutions ceases to be republican, either in form or substance. The statute of Louisiana which undertook to create it was a mere nullity, and all its proceedings were destitute of legal authority. It was at one time asserted that the Supreme Court of the State had held it constitutional and valid, which, if true, would prove that the court was no better than the Board; but the case cited shows that no such point was raised, debated, or determined.

The Board consisted of five persons. They were originally appointed by a carpet-bag Senate, without end of their tenure and with power to fill vacancies, which made them a close corporation and gave them perpetual succession. To put on some show of fairness, the law required that *all parties* should be *represented*. This was at first thought to be met by the appointment of *one* Democrat; but when a deed of more than common baseness was to be done, the Democrat was got rid of, and the other four, desiring to work in secret, refused to fill his place.



This suppressing Board did its work thoroughly from the start. It was never known to falter. Since its first organization in 1870, the majority of the whole people had been decidedly against the carpet-baggers at every election. But the Board always intercepted the returns, and so altered them as to make a majority the other way. Kellogg was a candidate for Governor; he was largely defeated: but the Board certified him elected. The certificate was so glaringly false that carpet-baggers themselves would not help to install him, and Democrats determined to assert their rights. It was then that General Grant, to the unspeakable shame of the nation, lifted him into office on the bayonets of the army. Afterward the outraged people rose in revolutionary wrath, drove him to shelter in the custom-house, and inaugurated the man they had lawfully elected. Again the President made war on the State, and restored the usurper to the place which did not belong to him. The Democrats regularly elected a majority of the Legislature; as regularly the Returning Board certified a majority of their seats to carpet-baggers or scalawags or negroes not chosen; and when the true members met to organize for business the army was punctually on hand to tumble them out of their hall.

Such was the condition of things when the parties took the field in 1876. The Democrats girded up their loins for a combat more important to them and their children than any they had yet been engaged in. They were not only to choose a Governor, Legislature, and State officers, but a President and Vice-President who would respect their rights, and not set aside their election by brute force. Messrs. Hayes and Wheeler were not believed to be evil-minded men, but they belonged to the anti-constitutional party, and their platform pledged them to walk in the footsteps of Grant; while, on the other hand, the just support of the people against the lawless outrages of the carpet-bag usurpers was written down among the first of the many reforms which Messrs. Tilden and Hendricks would be sure to introduce. The Democrats were without doubt a great majority over the carpet-baggers and the negroes who still adhered to them. False voting or cheating in the registration could not defeat the true men of the State. If they could only get their votes honestly counted, added up, and credited to their candidates, they would certainly be free in the future from the tyrannical domination which held them in durance for so many years. They felt that under these circumstances the electoral franchise was a possession inestimably precious:

"To lose 't or give 't away  
Were such perdition as nothing else could match."

They were, therefore, uncommonly cautious not to impair this great right, or endanger the success of its exercise, by any act which could bring them under the denunciation of even the Returning Board law.



All the clubs were earnestly and constantly exhorted, in circulars and otherwise, to "be careful to say and do nothing which could be construed into a threat or intimidation of any character," and advised to take affidavits on the day of election at each polling-place that no disturbance had occurred there.

The election came off on the proper day, supervised and controlled at every polling-place by officers of the carpet-bag interest. According to their own count the result was a majority of 7,639 for the Tilden electors. It has never yet been denied that this majority was made up of ballots cast by citizens legally qualified. The vote was regularly taken and properly counted, and a true record of it made *in perpetuam rei memoriam*. These facts being undisputed, it follows that the Tilden electors were *duly appointed*, if the people of the State have the appointing power, which they certainly have, unless the Constitution and the statute-book are not to be relied on.

But the opponents of Tilden and Hendricks determined that the record of the appointment made by the people should be mutilated and changed so as to make it appear as if electors for Hayes and Wheeler had been chosen. They pretended to believe that violence and intimidation had frightened the African Hayes men from the polls, and that their cowardice ought to be visited in the form of disfranchisement on the heads of others who had intrepidity enough to perform their political duty. The allegation was utterly false. It was made, not only without evidence to sustain it, but in the face of overwhelming proof to the contrary. All the places of registration and voting were guarded by the creatures of the Federal and State administrations, superintendents, commissioners, deputy marshals, and soldiers, and all of these with one voice said that the elections were peaceable and free. Indeed, it is literally impossible that any intimidation or violence could have been practiced. No sensible person ever gave credit to it for a moment. Notwithstanding much mental anxiety about the result, various reasons combined to make the election in Louisiana probably the *most* quiet and undisturbed in the Union.

The charge of actual intimidation at the polls having been exploded almost as soon as it was made, another was tried which stood a little longer. The intimidation, it was said, occurred, not at the election, but at other times and elsewhere: somebody, unnamed and unknown, had breathed out threatenings and slaughter so violent that many thousands absented themselves. This was vague enough to excite a superstitious belief in the existence of a "bulldozer," whom nobody had ever seen except as the goblin is seen which the imagination bodies forth from the evening mist. But it vanished into thin air when the truth appeared that this was the largest vote ever given in Louisiana, larger in proportion to the whole population than the average of all the States in the Union.



Lastly, they fell back on the naked fact that a considerable number of negroes had voted the Democratic ticket, and insisted that this was in itself sufficient evidence of intimidation. They built this theory on the assumption that no negro could ever be moved against a carpet-bagger except by his personal fears, and that all appeals to his other passions, or to his reason and conscience, must necessarily be in vain. In fact and in truth, a large percentage of the African population were from the beginning very strongly impressed against the strangers who had come into the State to rob the natives. Most of them were very stupid, but many had sense enough to see that this would come to no good. They had one cause of complaint which influenced them strongly. Much of the ponderous taxation under which the people suffered had been imposed on the pretense of schools for the *elevation* of the negro; when the fund came into the hands of carpet-bag officers they stole it of course, and left the negro to his aboriginal ignorance. The negroes, not liking this kind of elevation, became excited, and in some places large bodies of them together broke away from the carpet-baggers. Their revolt was perfectly natural; and it would have been universal, if their stupidity had been only a little less dense. Yet it is persistently asserted in effect that the carpet-bagger owns the negro by a title so incontestable that the vote of the latter is never withheld from the former except because of bulldozing, whereby the white Democrat ought to lose not only the vote given him by the negro, but his own vote in the bargain. This preposterous view pervades all the discussions on that side, inso-much that the foremost Republicans of the country have thought themselves making an argument for disfranchisement of Democrats by merely showing that the vote for the carpet-bag candidates fell below the aggregate number of black electors in a particular parish, or was less than that given at some former election.

One curious case of bulldozing is given by Mr. Morrison's committee. The negroes of East Feliciana fell away in large numbers from the carpet-baggers, and so many expressed their intention to vote on the other side that a considerable majority for the Democratic candidates was plainly foreseen. The chiefs of the carpet-baggers at New Orleans, being informed of this, instructed the local leaders of the parish not to vote; no ticket was put forth on their part; not a single Republican vote was cast, even by the parish officers. This was done on purpose to lay the groundwork for a charge of intimidation. East Feliciana was declared a bulldozed parish, and all the people in it were disfranchised.

Even if we assume the righteousness of the principle embodied in the Louisiana election law, that one man may be disfranchised because another has intimidated a third, there was no show of ground upon which the Democratic majority could be questioned. The minority

therefore left the case to the Returning Board, in full confidence that it was corrupt enough to act as desired without evidence, against law, and in defiance of the known truth.

The *personnel* of the Board justified the faith of the carpet-baggers and their allies. If the evidence concerning its members be rightly reported by the investigating committee, they were marked out by the history of their previous lives, noted and signed to do any deed of shame which might be required at their hands.\* Wells was a custom-house officer at New Orleans, and one of the worst of that bad lot—a defaulter to the State of long standing, without character for integrity or veracity, and for thirty years regarded as unworthy to be trusted. Anderson's character for honesty was equally bad; he had earned it in part by aiding, while he was a Senator, to put up a fraudulent job upon the State, and taking the iniquitous proceeds to himself. Of the two mulattoes, one was indicted for larceny, and, after admitting his guilt, was allowed to escape punishment, and *promptly* taken into the Board. The other was too ignorant to know his duty, but his testimony showed such indifference to the obligations of an oath that he was deemed as safe for the carpet-baggers as either of his colleagues.

They comprehended the situation, saw the difficulty of the work before them, and resolved to make it pay in something better than mere promises of "recognition," however "generous and ample." Wells, who was their spokesman, in private as in public, wrote in strict confidence to a carpet-bag Senator then at Washington a letter which, being condensed into plain English, means this:† "There's millions in it. See our friends and act promptly. Buy us immediately, or we will sell out to the other side. Talk freely to the gentleman who presents this; he knows the moves." To the bearer of the letter he explained that it was very hard work to count in the Republican candidate—the Democratic majority was too large to handle; he wanted to serve his party, but he would not take this job without compensation: he must have "two hundred thousand dollars apiece for himself and Anderson, and a smaller sum for the niggers." On this basis he authorized his ambassador at Washington to negotiate with the Republican managers.‡ At the same time he was offering himself at New Orleans to the Democrats, at first for half a million, but afterward proposed that he would leave in enough votes to elect Mr. Nicholls (Democratic candidate for Governor) if two hundred thousand dollars cash were first placed in his hands.\*

The Board, getting hold of the returns under the election law,

\* Report of Mr. Morrison's Louisiana Committee, February 1, 1877, p. 7.

† See the letter in Rep. Select Com. on Powers and Priv., Feb. 1, 1877, p. 180.

‡ Rep. Com. Priv. Powers, pp. 144, 145.

\* Rep. Com. Priv. Powers, p. 382.



proceeded to alter them in such manner as to bring out a result totally false. They averred that the Republican or carpet-bag candidates for Governor, Lieutenant-Governor, and for electors of President and Vice-President, and all State officers had a majority of the votes, and finally declared their election in formal certificates. It was not a mistake. As a mere blunder it was impossible. If they had been "fools as gross as ever ignorance made drunk," they could not have been led into any error about it. It was without doubt the work of a pre-arranged conspiracy to cheat the people of the State and the Union. The proofs, direct and circumstantial, that it was dishonest, corrupt, and fraudulent, are so numerous and so irresistibly strong, that no man can stand up and deny it, unless, in the language of Mr. O'Connor, he "has lost the faculty of blushing." In branding this transaction with utter and irredeemable infamy, the Democracy have not spoken without the book—nay, not without many books; for is it not written on all the records of Congress? Is it not reported by numerous committees? Is it not attested by clouds of witnesses? Is it not proved by papers which the conspirators themselves have made?

The action of the returning officers in this whole business was unsupported by legal authority. The Legislature of the State did not, because it could not, give them power to disfranchise qualified electors. They lacked, therefore, the general jurisdiction which they assumed. But that is not all: they proceeded in the very teeth even of the void statute which they professed to follow. That statute pretends to give them no such authority as they exercised over any return to which a protest or statement or charge of intimidation is not attached, when it is sent in by the Supervisor of Registration, or the Commissioner of Election, and the charge so attached to the return must be supported by the affidavits of three citizens of the proper parish.

Wanting this, the Board was absolutely without the pretense of power to touch the return from any parish or polling-place, except for the purpose of compiling it, and adding it as true to the others. By the election law of Louisiana, the Board has no more authority to examine or decide a question of intimidation, which is not raised by the election officers, than a private individual would have to steal it from the records and burn it. So stands the *law*. The *fact* is established, by conclusive evidence, that from every one of the Democratic parishes the returns came up without any charge, statement, or protest. In all those cases they were, therefore, without color of jurisdiction.\* But the conspirators could not afford to be balked of their

\* If any one doubts this proposition, let him look at Senator Bayard's elaborate exposition of it, where he will find it established by such unanswerable reasoning, and such a wealth of authority, that perversity itself will admit the law to be as he lays it down.



game by the failure of the local officers to make a false charge of intimidation. These votes must be excluded *per fas aut nefas*, and the Returning Board must do it; that was what the Board was made for. The returning officers went upon the principle *aut inveniam aut faciam*. They made the protests which they could not find; affidavits which no creature in the parishes was base enough to back with his oath were fabricated in the custom-house, and used by the Board with a full knowledge that they were mere counterfeits. The exclusion of returns on the ground of intimidation was in every case dishonest, for in none was there a particle of evidence to justify it. When nothing else would serve the purpose, they did not scruple a resort to plain forgery. Of the return from Vernon Parish, every figure on the whole broad sheet was altered, with elaborate pains, under the special direction of Wells. Perjury and subornation of perjury entered largely into the business. There is hardly any species of the *crimen falsi* for which the law has a punishment that did not become an elementary part of the Great Fraud which was committed when the defeated electors and State officers of Louisiana were falsely certified as chosen by the people.

It seems necessary and proper—but it is difficult—to say what judgment should be given on the conduct of the distinguished Republican gentlemen, headed by Senator Sherman, who went to Louisiana to see the count made. Were they accomplices in the crime of the Returning Board? Whosoever wishes to answer this question fairly, must remember that he is speaking of men who stand high, not for talents alone, but for all the virtues which win public confidence and inspire general respect. All presumptions are in their favor; nothing can be justly concluded against them except from the clearest proof. It must therefore be considered as settled that they had no connection with the forgeries of particular return papers or with the perjuries of the custom-house; if Wells was bought with anything beyond the promise of “recognition,” they had nothing to do with the bribery; no knowledge of these specific offenses has been traced to them. But they might have caused a true count of the votes if they had wished it; one word of honest reprobation from them would have paralyzed the rascality of the Returning Board. If they had complied with the requests of the Democrats, to use their joint influence for justice and truth, the conspiracy would have broken up in an hour. They did undoubtedly know, what everybody else knew, that the Tilden electors had been duly appointed by a majority of nearly eight thousand votes legally cast; they could not help but see that at least. And they must have known that no just reason and no legal authority existed to alter this result or falsify the record which proved it. Yet they refused to open their lips for the right of the people to choose their own agents; asserted the constitutional power of the returning officers to



disfranchise qualified voters ; comforted these miscreants with the assurance of their defense—did, in fact, defend them even to the extent of pronouncing extravagant eulogies upon them ; in short, encouraged, aided, and abetted, by every means in their power, the perpetration of the Great Fraud, and after it was done held it up as a righteous act.

These gentlemen probably have some excuse for their behavior which has not yet appeared. The presidency, all the jobs and offices of the Union, and four years of exemption from the hand of Tilden's sweeping reform, depended upon the game they were playing. The stake being so heavy, and the dice ready loaded to their hand, the temptation to a foul throw was very severe. Perhaps it is too much to expect that a body of politicians in these degenerate days should act with scrupulous honesty, like the men who filled high stations in early times. The false philosophy of Seneca, that all immoralities are justified when done *regnandi causa*, gains ground upon us rapidly. The rules which meet with universal observance in private affairs are set at naught in political action. Election frauds are practiced by men who would not cheat in a horse-trade ; bogus returns are palmed off as true by those who would scorn to pass counterfeit money ; and Christian statesmen are not expected to know that stealing the vote of a State comes within the prohibition of the eighth commandment.

But they do not measure their conduct by a safe standard if they think it right, under any circumstances, to cheat a self-governing nation by nullifying the legal vote of its people. No matter how little respect they may have for the judgment of the mass, conceding that our naturalization laws are too liberal, and negro suffrage wholly unwise, it must still be remembered that this right of voting lies at the foundation of our political structure. We have no public institutions that are not built upon that. Our Ship of State has no other keel, and the perfidy that scuttles the bottom exposes cargo, crew, and passengers to utter destruction. Besides, we have all agreed with one another that the will of the whole people, as a collective body, shall be spoken by the major number of individuals : we promised and swore that we would be governed by that will. If we violate this solemn compact, we are covenant-breakers, and can expect only to be turned out among "the nations which know not God." Moreover, taking the lowest possible view of the subject, and considering a presidential election as a mere game of skill or hazard, he must be regarded as a political black-leg who snatches and makes off with the stakes he has lost according to the rules.

Another question rises here, which the Muse of History may answer at her leisure : Is there any justification of General Grant's conduct in this business ? Within two or three days after the election it became perfectly well known to the whole country that in Louisiana



there had been a full poll, and a large majority for the Tilden electors. No reason was suggested by anybody for falsifying this result. The apprehension that it would be falsified in the return arose slowly out of the fact that the election machinery of the State was in the hands of mere knaves who were just base enough to do it; and these were General Grant's own knaves, whom for years he had kept in their places by lawless force. It was then that he said no man could afford to be President by a fraud, and sent a committee to see that a true count was made. This was fair-seeming enough; but he did not row the way he was looking. Every one of his committee favored the fraud, and their report, which he indorsed and sent to Congress, was a defense of it from beginning to end. He had supported and enforced frauds of the same kind several times before, and now his troops were at New Orleans avowedly to protect the carpet-baggers while they were repeating them on a large scale. Besides, when Chandler promised the fraudulent Governor of Florida to send troops and money to that State after the election—troops and money to count the votes—he declared in one of his dispatches that the President had been consulted. Still further, while his party in Congress were holding up the fraud, he answered the arguments in favor of Tilden's right by ordering to the capital all the cavalry, artillery, and infantry within reach. Whether these circumstances be sufficient or not to convict him of participation in the fraud, let the world judge.

When the wrong was accomplished at New Orleans—when the Returning Board had suppressed the Democratic majority, and Kellogg certified, what he knew to be false, that he himself and seven other men of the same sort were chosen by the people as electors of President and Vice-President; when these false pretenders actually met as electors, made out and sent to Washington their own vote, to be counted as the vote of the State—nobody except those engaged in it had the least belief that such a swindle could ever succeed. Democratic denunciation was loud, to be sure, but quiet, unpartisan people laughed at the folly of it. A little while afterward the aspect of things changed materially. The country was astounded to discover that the commanders of the Republican forces had made up their minds to carry it through if they could. It would be unjust to say that this resolution was unanimous. Several members of the lower house expressed their decided opposition to it. An unascertained number of Senators, including the ablest Republicans in the body, are well understood to have been altogether averse; but, not seeing the way of resistance open, they were silent, and permitted the dead weight of their influence to lie on the fraudulent side of the scale. Some of the foremost journals of the administration party denounced it in unequivocal terms, as did also the whole independent press. The great lawyers of the Republican party would not endure it; for in-



stance, Mr. Carpenter, of Wisconsin, and Mr. Field, of New York, who had voted against Tilden, assaulted the foul conspiracy with the whole force of their logic and eloquence. But the fraud was defended by men whom the party was accustomed to obey, the mutinous were brought under control, the indifferent were quickened into active participation, and "lewd fellows of the baser sort" rushed to the work as to a labor of love. So it came to pass that a great political party, comprising American citizens of all the best classes, was thrown with nearly its whole momentum of weight and velocity upon the side of a manifest and most notorious swindle. To the immortal honor of the Democracy, not one of its men in any part of the country shrunk from his duty or wavered in his allegiance to the truth.

But how was the object of the conspiracy to be accomplished? The House of Representatives was Democratic, and without its consent, expressed or implied in some form or another, the Senate could not give effect to a false count. The first intention was to claim that the President of the Senate had power to determine absolutely and arbitrarily what electoral votes should be counted and what not. This was the great rallying-point until Mr. Conkling took it up, and, in a speech of surpassing ability, utterly demolished and reduced it to invisible atoms. It became settled, therefore, that the two houses must count the votes, and this clearly implied the power to inquire and determine what were votes. It could not be denied that the voice of the House of Representatives was at least as potential as that of the Senators; and it was not supposed that the House would suffer a fraud so glaring as this to be thrust down the throat of the country "against the stomach of its sense." But if the two bodies would declare inconsistent results of the count, and proclaim the election of different Presidents, a state of things might come which would subject our institutions to a strain severe enough to endanger them greatly. It was in these difficult circumstances that a mixed commission of fifteen was proposed, consisting of five Senators, five Representatives, and five Judges of the Supreme Court. The mode of appointing them made it certain that fourteen would be equally divided between the parties; and, as the fifth Judge would be named by the consent of his brethren on both sides, he might be expected to stand between them, like a daysman, with a hand as heavy on one head as the other. The Democrats consented to this in the belief that no seven Republicans could be taken from the court or from Congress who would swear to decide the truth and then uphold a known fraud; if mistaken in that opinion of their adversaries' honesty, they felt sure, at all events, that the umpire would be a fair-minded man. They were bitterly disappointed; the Commission went eight to seven for the Great Fraud and all its branches; for fraud in the detail and in the aggregate; for every item



of fraud that was necessary to make the sum total big enough—eight to seven all the time.

We must look at the state of the case as it went before the Commission. Tilden and Hendricks had 184 electoral votes clear and free of all dispute, one less\*than a majority of the whole number. They also had in Louisiana *eight*, and in Florida *four*, appointed by the people, but falsely certified to Hayes and Wheeler by the Governors. In Oregon they had *one* certified by the Governor, but against whom a popular majority had been cast for an ineligible candidate. To elect Hayes, it was necessary that each and every one of these thirteen votes should be taken from Tilden and given to Hayes. As this required many distinct rulings based upon contradictory grounds, the path of the Commission was not only steep, but crooked.

The great and important duty cast upon the Commission by a special law and by a special oath of each member was to decide, in the case of contested votes from a State, "whether any and what votes from such State are the votes *provided for by the Constitution* of the United States, and how many and what persons were *duly appointed* electors in such State." It is not denied that the sole power of appointing electors for the States of Louisiana and Florida is in the people. It was then and still is an admitted fact that the people had exercised the power of appointment in the prescribed and proper way; they did *duly* make an appointment of electors, and their act was *duly* recorded, and so made a perpetual memory. This thing was not "done in a corner"; it was "seen and known of all men." That each of the two States named had duly appointed Tilden electors at a regular election called for that purpose on the 7th of November, in pursuance of law, was a part of their history as much as the fact that they were States of the Union. All the members of the Commission knew it as well as they knew the geographical position of Tallahassee or New Orleans. It needed no proof; but if specific evidence had been required, there was the record, from which the truth glared upon them as clear as the sun. They shut their eyes upon the record, and refused to see "how many and what persons were duly appointed electors" by the people, but listened eagerly to the evidence (*aliunde* though it was) which showed "how many and what persons" had been designated by the returning officers. It was ultimately held (*eight to seven*) that the appointees of the Returning Board were *duly* appointed, and the appointees of the people were *unduly* appointed. Did the Eight suppose that the legal power to make such an appointment was vested by law in the Returning Boards? Did they think it was *not* vested in the people? No, that is impossible. But they may have conscientiously believed that the interest of their faction would be well served by Hayes's election. They may have been prompted by a virtuous



admiration of carpet-bag government, and were sincerely anxious to save it from Tilden's reform.

But this decision in favor of fraud which so shocked the common sense and common honesty of the nation was not made without some attempt to justify it. The Eight gave reasons so many and so plausible that Kellogg and Wells must have chuckled with delight when they heard them. One argument very seriously urged was that it would be troublesome, and require a great deal of time, to ascertain who was duly appointed by the people. It was much easier to accept the false vote and say no more about it. To decide how many and what persons got certificates from the Returning Board was a short and simple process; but to push the inquiry behind that—to inquire whether the certificate was honest, to look for the evidence which would show who were *duly* appointed—*hic labor hoc opus est*. The Seven reminded the Eight, but reminded them in vain, that the *due appointment* which nobody in the world, except the people, had the least right to make, was the very thing which they were there to find out; and they could not be excused from a duty to which they were pledged and sworn by the mere inconvenience of performing it. Besides, the Eight knew very well that there was no difficulty in it; it was but looking at the record of the appointment as the people made it up; they could read it as they ran; the truth was plainer than the lie; the honesty of the case was as easily seen as the fraud. But no persuasion could influence them to cast even a glance at the actual appointment. What did they think this Commission was made for? Why was this great combination of learning and statecraft set up? According to the Eight, its sole purpose was, not to determine any matter in dispute between the parties, but merely to declare that the Returning Boards had certified for the Hayes electors; which everybody knew already and nobody ever denied. If its object was what the law said—to decide who were duly appointed—then the Eight succeeded in making it merely a splendid abortion, because, among other reasons, it was too much trouble to make it anything else.

But the Commission, following the lead of counsel for Mr. Hayes, insisted that the certificate of the proper State officer ought to be regarded as conclusive *evidence* of the appointment made by the people. It is undoubtedly true that the State has a right to speak on this subject through her own organs, and, when she does so speak, her voice should be regarded as true. But what officer is her proper organ? The Governor being her political chief, and his certificate being required by act of Congress, it would not have been unreasonable to hold that it was conclusive unless tainted with fraud. The Hayes electors had the Executive certificate in Louisiana and Florida, and this in regard to those States gave the Eight a great legal advantage. But they threw it away, abandoned the attestation of the Governor as worthless,

claimed no faith or credit for it, and pronounced it open to contradiction, no matter how honestly it may have been given. What was the meaning of this phenomenal ruling which apparently opened the door of investigation even wider than the Democrats asked? It was understood by everybody. The Commission was hedging for Oregon. The Eight were reaching across to the Pacific for the one vote there, which was just as important as the twelve on the Gulf of Mexico.

But having gone behind the Governor's certificate for the sake of correcting errors, could there be any possible justification for stopping before the truth was reached? If the head of the Commonwealth, whose attestation is required by Federal law, went for nothing whenever it was contradicted, how could the conclusiveness be asserted of a paper made by subordinate officers unknown outside of the State, and powerless even by the local law to make a certificate of more than *prima facie* validity? Yet the Electoral Commission (eight to seven) decided that the Governor's certificate might be set aside for a mere mistake of law or fact, while that of the Returning Board would stand, though known to be founded on falsehood and saturated all through with corruption.

The unvarying preference of the eight Commissioners for the false over the true becomes very striking at this point. When they got behind the Governor's papers, they found lying *aliunde* two other sets of documents, one of which was a record of the actual appointment made by the people, the other was a mere fabrication of the Returning Board without any semblance of truth; they embraced the latter with all the ardor of sincere affection, and rejected the former with all possible marks of their dislike.\*

To give the decrees of the Returning Boards the conclusive effect claimed for them, it was necessary to hold that they were legally invested with judicial powers, and that their jurisdiction, whether rightly or erroneously exercised, was absolute over the whole subject-

\* The point contended for by Mr. Hayes's counsel, and decided in their favor by the Commission, was that no evidence could be received except the report of the Returning Board as to the actual result of the election. The Commission positively refused the offer of Mr. Tilden's counsel to prove the facts, and would not receive or look at the evidence showing that by the precinct and county certificates on which the board acted the majority was for the Tilden electors. Yet the "Congressional Record" of February 6, 1877, p. 29, represents that Mr. Hayes's counsel on the trial read to the tribunal several alleged computations of the vote cast at the election, to show that the Hayes electors had in fact the majority. These computations, so read, were taken from a report made to the House of Representatives by the Republican minority of its committee. If this be true, then the Commission received evidence *aliunde* to bolster up the certificate of the Returning Board, while it refused to look at that which would have overthrown it by proving its entire falsehood. Mr. O'Connor thinks that this misrepresents the facts of the trial, and that it is an interpolation upon the record intended to pervert the truth of history.



matter. In Florida the statute which creates the Board gave it nothing except ministerial powers, and the Supreme Court of that State solemnly pronounced its claim of judicial authority to be altogether unfounded. But the Electoral Commission would not be influenced by either the written or the unwritten law. The Commission conceded to the Louisiana Board all the judicial power it needed to sanctify its disfranchisement of the people in the face of the Constitution, which expressly forbade it. This general jurisdiction was not all they bestowed on those boards; they declared in substance that it might be well exercised in particular cases where it was not invoked according to the law which gave them being, as, for instance, where a Louisiana parish sent up its return without a protest, statement, or affidavit.

The eight Commissioners did not stop there. They went much further. They practically justified and sustained all the infinite rascality of the Returning Boards. They not only refused to take voluntary notice of the atrocious frauds perpetrated by them, but they excluded the proofs of their corruption which the Democratic counsel held in their hands and offered to exhibit. These Commissioners choked off the evidence, and smothered it as remorselessly as Wells and his associates suppressed Democratic returns. And this they put on the express ground that to them it was all one whether the action of these boards was fraudulent or not. They would suffer no proof of corruption to invalidate the right claimed by a Hayes man to put in the vote of a State for his candidate.

This monstrous and unendurable outrage was resisted to the utmost. All of the *Seven* implored and protested against it. Judge Clifford, the President of the Commission, laid it down as a maxim of the common law that fraud vitiates whatever it touches, and proved it undeniably. He might have proved more. It is not merely a maxim of the common law: it belongs to all countries and all ages; no code can claim it exclusively; it pervades all systems of jurisprudence; it has its home in every honest heart; it is the universal sentiment of all just men; it applies to all human dealings. Judge Field looked in the face of the majority, and told them plainly that their disregard of this great principle was "as shocking in morals as it was unsound in law," and added: "It is elementary knowledge that fraud vitiates all proceedings, even the most solemn; that no form of words, no amount of ceremony, no solemnity of proceeding, can shield it from exposure, or protect its structure from assault and destruction." But the Eight were as deaf as adders to the voice of reason and justice. They would not permit the fraud to be assaulted, much less to be destroyed. They stood over it to shield it, protect it, and save it, interposing the broad ægis of their authority to cover it against every attack.

The Eight persistently denied their power or that of Congress to



do what they were commanded by the law to do—that is, decide who were *duly appointed*. They would only decide that certain persons were named as electors by a Returning Board. They would not understand that the appointment by the people might be one thing and the action of the Returning Board another, or that the latter, even as evidence of the former, was worthless if it was fraudulent.

They insisted that the Returning Board certificate must be received with all the honors ; to question its verity would be usurpation upon State rights which they (the Eight) were most careful to preserve intact and unimpaired. “But,” said they, “if a Returning Board behaves unfaithfully, the State herself, by her own authorities, must see to it and correct the wrong.” Thereupon came Florida, and showed that she had, in fact, made the correction. All the departments of her government—her Legislature, her courts, and her Executive—had at different times examined and revised the action of her Returning Board ; pronounced it false, fraudulent, and void ; declared that the Tilden electors were duly appointed, and left the Hayes candidates without a shred of authority to vote for the State. There stood the State herself, upright before the august Commission, with all the evidence in her hand, protesting against the fraud and demanding that no vote should be received except the vote of her own electors duly appointed by her people. But the Commission answered that *under the circumstances* of this case she had no right to defend *herself* against the fraud of a Returning Board any more than she had to *be defended* by the Federal authorities. Whatever she might do, or decide, or resolve upon, the Great Fraud was her master and she must submit. So it appeared, after all the fine speeches about State rights, that Florida had but one right—the right to be cheated out of her vote by the same knaves who had already robbed her of her property. That right was sacred and intangible, and the Commission promptly put her in full possession of it.

In the case of Florida there was one piece of evidence offered which not only commended itself strongly to the consideration of just men, but, being supported by certain artificial rules of pleading and practice, it was expected to find acceptance in the narrowest mind on the bench. This was the record of a judicial proceeding commenced in a Florida court by writ of *quo warranto* at the suit of the State upon the relation of the Tilden electors against the Hayes electors. The parties came into court and pleaded, and the issue made between them was whether one set or the other (the relators or the defendants) were duly appointed electors of President and Vice-President by and for the State of Florida. Evidence was taken, the cause was debated by counsel on both sides, and after consideration it was adjudged by the court, against the defendants and in favor of the State, that the relators *were* duly appointed and the defendants *not*. This fact, thus



determined by the court, was precisely the same fact afterward controverted by the same parties before the Commission. When submitted to the latter tribunal, it was *res judicata*; not only true, but fixed and settled beyond the reach of contradiction. The judgment was not impeached for fraud or reversed for error. It was in full force and virtue. It was not denied that the court which made the adjudication had entire and complete jurisdiction both of the subject-matter and of the parties. By all reason and all authority the Commission was bound to respect this judgment as conclusive evidence. But to have done this would have made Tilden President and defeated the purpose of all the frauds in Louisiana and Florida both. They did not do it; they allowed the judgment to have no effect at all. They but looked to see what it was and immediately swept it out of sight. They put it far from them, and then proceeded to pronounce a different judgment, which suited the Hayes men better. How *could* they break all the bars of legal authority which fenced them about? What starting-hole *did* they find to escape from the corner into which they were driven and penned up by the law of the land? We shall see.

They said the judgment of the court was *too late*; it was pronounced after the Hayes electors had met and made out their votes, and sent them to the President of the Senate. Here were two sets of electors, each claiming the exclusive right to vote for the State, and both of them actually sent up their ballots. One of them was duly appointed, and had the authority claimed; the other set was necessarily composed of mere pretenders, who were not duly appointed, and, having no authority, their vote was a mere nullity. Which party was right, and which wrong? The conflict must be settled somehow. Where was the jurisdiction to determine it? Undoubtedly, and by universal admission, the power was in the courts of the State from which both claimants professed to derive their authority. The proper State court did determine it; but the Commissioners said that, however competent the jurisdiction of the court, it was too late in making its decision, and then they proceeded, in the exercise of a jurisdiction exactly similar, to decide the same questions of fact and law the other way. Now comes the query, if the court's decision was worthless because it was *late*, what was the value of the Commission's judgment which was *LATER*? The Eight did actually, not in words, but in substance and effect, give vent to the bald absurdity that it was too late in January to decide the dispute in favor of Tilden, but not too late in February to decide it in favor of Hayes.

Another thing they said: This judgment, though it proved the fact that the Hayes claimants were not duly appointed, and had no title to the office of electors, did not invalidate the acts previously done by them while they were *de facto* in the exercise of the powers



they usurped. There is a just and necessary rule of law which declares that the validity of acts regularly done by an officer shall not depend on the title by which he holds the office. You may remove a sheriff by a *quo warranto* without destroying the titles of all who purchased land at his sales, or a judge without vacating his decrees, or a treasurer without saying that his payment of a public debt is not satisfaction; but where a person assumes a special authority to do a particular thing the validity of the act *does* depend on the authority to do it. This latter rule applies here. These electors claimed a right to vote for the State under a special appointment given them to do that one act. When a competent court adjudicated as matter of fact that the Hayes electors had no appointment, it was a logical and legal necessity which declared the unauthorized votes to be null and void. If this were not the principle, then any impostor, or any number of impostors, might send up their ballots, and one would be as good as another.

But, again, let it not be forgotten that the Tilden electors had also voted at the same time in the same way. Why did not this fact make as much weight for them as for the others? It will excite the wonder of the world to learn that, in the opinion of the Eight, a person who voted under an appointment given him by the people according to law could not be even a *de facto* elector; but another person, who had nothing to claim by except the false, fraudulent, and void declaration of a Returning Board, was good *de facto*, if he was good for nothing else. This doctrine of *de facto* sanctification, saving acts which have no other "relish of salvation in them," and making the votes of unauthorized men as good as if they came from persons duly appointed, cuts a great figure throughout the whole case. It is not applicable, but the Eight apply it everywhere, and, strange to say, they never use it when it does not make in favor of some fraud or other. One who votes according to the public will of the State, legally expressed through the ballot-boxes, is *de facto* nothing; but if he was defeated or ineligible, he is *de facto* all he wants to be. One of the Hayes electors in Louisiana was a Federal officer; his election was forbidden by the Constitution of the United States, and he was not elected but beaten at the polls; *de facto* strained its utmost power on him, and pulled him through, in spite of Constitution and people both. But his Democratic competitor, who had acted as an elector in the same way and to the same extent, was legally chosen by an overwhelming majority, and constitutionally eligible; therefore *de facto* could do nothing for him.

In all the discussions of the subject the men disposed to favor the conspiracy professed a most profound veneration for the "forms of law." This was the key-note struck at New Orleans by the visiting committee, and it is heard in every subsequent argument of counsel and commissioner on that side. It seemed to be understood among



them that a formal cheat was perfectly safe from exposure. If the sepulchre was whited on the outside, it made no difference that it was filled with "corruption, dead men's bones, and all uncleanness." No refuge of lies could be swept away, no hiding-place of falsehood could ever be uncovered, if it was built in the prescribed form. Only give it the legal shape, and the overflowing scourge would be turned aside. But legal form, however valuable as a covering for fraud, was, in their judgment, no protection for truth or justice or public right. The will of Louisiana was pronounced at the election with all the solemnities required by the law of the State and of the United States. The appointment of the Tilden electors on the 7th of November was a perfectly legal piece of work; there was not a flaw in the record of it as it came from the hands of the appointing power. But it was looked on with perfect contempt. Neither the visiting committee nor the Hayes counsel nor the eight Commissioners bestowed on it any of their love. Their affections were otherwise engaged; they gave the homage and devotion of their hearts to the beautiful regularity, the exquisite precision, with which the Returning Board compounded its false certificate.

Another paradox of the Eight is curious enough to be noted. They declared repeatedly that they had no power to try a contested election case, and for that reason they would not look at the evidence which showed what persons were duly appointed electors by the people. Now mark! The case was this: Each of those votes came accompanied by what was asserted to be proof that it was cast by electors duly appointed. The conflict was to be determined by the verifying power which Congress unquestionably has, and which the Commissioners expressly assumed when they swore that they would decide who were duly appointed. To decide it one way or the other required precisely the same jurisdiction, and called into exercise exactly the same faculties. Yet they held that, if they decided according to the truth in favor of the electors actually appointed, they would be trying a contested election; but if they decided in favor of the pretenders, who had nothing but a fraudulent certificate, they would *not* be trying a contested election; in other words, their jurisdiction was full and ample to decide it falsely, but wholly unequal to the duty of deciding it truly.

Perhaps nothing shows more plainly the *animus* of the eight commissioners than the determination they made upon the case of Brewster, ineligible elector in Louisiana. Keep in mind that their defined duty was to decide who were duly appointed, and what votes were provided for by the Constitution, and think how they performed it in this part of the case. Brewster was not only defeated at the polls like the rest; he was besides a Federal office-holder, and the Constitution expressly declares that no such person shall be appointed an elector.



But for the purpose of electing Mr. Hayes, his vote was worth as much as all the others. To get that vote for their candidate, they were required to go further than they went for any of the rest, and so they held: 1. That the certificate of the Returning Board was *proprio vigore* an appointment. 2. That it was a *due* appointment, though corrupt and dishonest. 3. That this was a vote *provided for* by the Constitution, though the Constitution in plain words *provided against* it.

After all, there was but one question before the Commission. Had the American people a right to elect their own Chief Magistrate? They had the right. Their ancestors struggled for it long, fought for it often, and won it fairly. Being imbedded in their Constitution, it can not be destroyed except by a force strong enough to overthrow the organic structure of the government itself. Legislative enactments or judicial decisions are powerless either to strengthen or impair it. The legerdemain of law-craft, the catches of special pleading, the snapperadoes of practice, do not help us to decide a matter like this. A great nation must not be impaled upon a pin's point. Precedents which might bind a Court of Quarter Sessions determining the settlement of a pauper can not tie up the hands of the Supreme Legislature defending a fundamental right of the whole people. When Grenville, in 1766, cited the authority of divers cases to show that America might be taxed without representation, Pitt answered: "I come not here armed at all points, with the statute-book doubled down in dog's ears to defend the cause of liberty. I can acknowledge no veneration for any procedure, law, or ordinance, that is repugnant to reason and the first principles of our Constitution. I rejoice that America has resisted." So spoke the defiant friend of our race in the presence of a hostile Parliament ten years before the Declaration of Independence. And now, after this long interval of time, we behold our greatest right—the right on which all other rights depend—successfully assailed in our own Congress with the same small weapons that Grenville used. If brute force had crushed it out, we might have borne the calamity with fortitude; but to see it circumvented by knavery and pettifogged to death, is too much to be endured with any show of patience.

If the majority of that Commission could but have realized their responsibility to God and man, if they could only have understood that, in a free country, liberty and law are inseparable, they would have been enrolled among our greatest benefactors, for they would have added strength and grandeur to our institutions. But they could not come up to the height of the great subject. Party passion so benumbed their faculties that a fundamental right seemed nothing to them when it came in conflict with some argument supported by artificial reasoning and drawn from the supposed analogies of technical



procedure. The Constitution was in their judgment outweighed by a void statute and the action of a corrupt Returning Board.

Let these things be remembered by our children's children, and if the friends of free government shall ever again have such a contest, let them take care how they leave the decision of it to a tribunal like that which betrayed the nation by enthroning the *Great Fraud* of 1876.

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#### LETTER TO MR. STOUGHTON.

*To Hon. E. W. Stoughton:*

IF I do not reply to your article in the last number of the "North American Review," you will remain under the delusion that your argument is irresistible. I will try to correct that mistake by showing that, if there be a defense for the Great Fraud, you decidedly are not the person to make it. Doing this mainly for your own edification, I address you directly.

I separate your personal invective from your discussion of the case, though they are so mixed as to make separation difficult, and I will consider your objections to my view of the subject as if they had been expressed in becoming and decent language.

You think, as your political friends in general think, that after the decision of the Electoral Commission against us, we ought to submit in silence and not vex the victorious party with an appeal to the tribunal of public opinion. We *have* submitted. The proper representatives of both parties agreed to leave the dispute to a body which they constituted for the purpose of settling it. We could not refuse to abide by the award without being guilty of bad faith. We do not now assert the injustice of it with any view to reverse or modify it. You need not fear the stability of that award, however iniquitous you may know it to be. You can enjoy its fruits in perfect security, and we the people will on our part "perform the vows which we have vowed before the Lord," however much it may be "to our own hurt."

But to acquiesce without a protest—to confess tacitly that the wrong is right, and the evil a good—that is out of the question. In discussing the whole subject with great plainness of speech, we not only obey an impulse, but perform a duty. For this I will give some reasons, and take the chances of making you comprehend them.

In the first place, it concerns the reputations of nearly all the public men of the present day. You and I are too obscure to be noticed by history, but the great characters of our time on both sides will go down to posterity clothed with honor or covered with infamy, accord-

ing as they have been trying to further the fraud or stop it. Remember there *was* a fraud, and a very gross one, committed by one party or the other. If the State of Louisiana chose Kellogg and the other candidates on the Hayes ticket for presidential electors, and the Democratic politicians, knowing this, did, nevertheless, deny the truth and fabricated a false return for Tilden, which they persisted to the last in trying to pass for a true one, they were a combination of most redemptionless rogues; and it will be recorded, as an aggravation of their crime, that when the righteous majority of the Electoral Commission crushed out their falsehood they turned about and, with calumnious accusations, charged their own guilt upon their innocent opponents. The converse of these propositions is also true. If the Tilden electors were duly chosen by the people, and the Republican leaders in and out of the State altered the returns, falsified the records, and constituted a counterfeit Electoral College, whereby the people of the State and the Union were cheated out of the President whom they had legally elected by a large majority, then it is only anticipating history to say that all who aided, abetted, and encouraged that offense ought to be "classed among the worst malefactors of the age." Seeing the great interest that hangs on this question, is it not fairly worth our while to give it a full examination while the facts are yet fresh in the memory of men?

Another consideration there is, which makes a public appeal upon the subject not only proper, but absolutely necessary, if our convictions are not founded in total mistake. The candidate to whom you are opposed was, as we understand the case, elected by an overwhelming popular vote, and by a majority of at least twenty-three in the Electoral Colleges. But you defeated the legally expressed will of the people and the States, by means of false tokens and divers covinous practices, contrary to the law and against the moral sense of all honest men. The decision of the Electoral Commission, by making the fraud perfectly successful, invites a repetition of it, and you undoubtedly *will* repeat it, unless you are in some way deterred. Now, the nation will not submit to another such outrage. We promote your true interests as well as ours if we prevent you from endangering the peace of the country by trying this kind of foul play over again. To that end the best, as well as the kindest, means I know of, is a complete exposure of the fraud itself, and a free criticism of the Commission, which should have rebuked it, but did not.

You deprecate every expression from any quarter which is calculated to loosen the confidence of the public in the judicial authorities, and think, therefore, that the Electoral Commission should be very tenderly dealt with. Mr. Jefferson said that jealousy of rulers, not confidence, was the virtue of all true citizens of a republic. Without stopping to consider whether this applies to judges, as well as other



officers, I answer you by saying that the Electoral Commission was not a judicial tribunal, and did not behave like one. It was a political body organized for a special occasion, to determine a particular question, "according to the best of its prejudices"; and it performed the function assigned to it by disregarding the law of the case and shutting its eyes on the facts. The less confidence we have in such tribunals the better; indeed, a reasonable regard for the safety of our most important rights requires that we should have none at all.

You are welcome to the admission (if you think it will do you any good) that I look not only with contempt, but with abhorrence, upon all the special tribunals which have disgraced the history of our race on both sides of the Atlantic, including the Star Chamber, the Court of High Commission, all military and all ecclesiastical commissions, and all commissions for political purposes. If I could revive in this generation the stern hatred which our fathers felt for those dangerous enemies of liberty and justice, I would be a great public benefactor, and you would never get another commission of any kind to uphold fraud, to sanctify persecution, or to oppress the innocent.

You take violent exception to my use of the word "conspiracy," as applied to those unlawful proceedings which resulted in defeating Mr. Tilden's large majority. Of course, you prefer your own euphemistic phrase, and call it taking "a political advantage." But I can not see wherein my term is wrong. Your objection is like that of ancient Pistol to the word *steal*, for which he wished to substitute *convey*.

To say conspiracy, fraud, or anything else which implies that your friends in Louisiana and their allies were guilty of crime, is in your opinion coarse and brutal. Your refined taste has been deeply offended in this way, not only by me, but by the whole Democracy wherever they have written or spoken on the subject, either in Congress, before the Commission, or elsewhere. The impoliteness of making the accusation has been uniformly heightened by the rough boldness with which it was proved to be true, and by the "blistering words" in which it was denounced. Perhaps all the Democrats were wrong to some extent. It may be that we ought not to have spoken out in harsh terms of censure, or said anything to disturb the serenity of the knaves who did us this terrible injustice. But if you are not altogether blind, you must see that this was, in our situation, simply impossible. Here was a great nation which had suffered by misgovernment more than any other under the sun—her property taxed almost to confiscation—her industry crushed to the earth—her public domain squandered away—her best citizens starving by the hundred thousand in the midst of the plenty which their own labor had produced, while corruption was reveling in high places and fattening on the general distress. The people determined to reform the administration of their



public affairs, and restore their own prosperity, by choosing rulers whom they could trust for that purpose. They expressed their will to that effect legally, constitutionally, and peacefully, and they were defeated by an impudent swindle. Is it any wonder that the great heart of the Democracy swelled with indignation? Even if their feelings found vent in language too passionate, you ought to remember with Burke, that "something must be pardoned to the spirit of liberty."

I concede, however, that no feeling of resentment will excuse us for charging a conspiracy where none existed, or fraud where none was committed. Even if we were wronged, that does not give us the privilege of applying terms which do not express the real nature of the injury. We can justify our words only by showing that we use them truly, in a sense authorized by the law and the common speech of the country. Otherwise our language is, like some of yours, mere vituperation, disgraceful only to those who utter it. Accepting, therefore, the *onus probandi*, let me bring your attention to certain facts well and publicly known.

It is proved, if human testimony can prove anything, that the people of Louisiana did, on the seventh of November last past, duly, and by regular ballots, make an appointment of presidential electors known to be in favor of Tilden and Hendricks, and authorized them to cast the vote of the State. It is just as clear that the appointment made by the people was set at naught by a gross falsification of the records and returns of the election. This was effected by the corrupt agency of certain local officers, combined with other persons in and out of the State, who incited them to it, abetted them in it, and helped them to clothe the cheat in what they said were the "forms of law." Is it a misnomer to call this a conspiracy? That offense is defined as a combination of several persons to accomplish an unlawful purpose, by concerted action. How can you get your friends outside of this definition? Persons acting in this way are always treated as conspirators, and, by the law of every civilized country in the world, they are severely punished. Take one simple and actual case out of thousands that might be given. Divers dishonest men at St. Louis combined to defraud the United States of their revenue from distilled spirits, and they did it by a preconcerted series of false and deceptive returns which certain public officers, confederated with them, passed off as true. This was held, and justly held, to be a conspiracy, and some of the parties to it were sent to the penitentiary.

Perhaps you do not see the parallel, but the analogue is perfect, except in this: that in the case which you defend, the object of the combination was to cheat the people out of their right of self-government, while the purpose of the St. Louis conspiracy was to rob them of their money. If this makes any difference, it is greatly against you,



for liberty is more precious than gold. In the judgment of the virtuous and wise men who won the independence and built up the institutions of this country, the privilege of choosing our own rulers was infinitely the richest part of the great inheritance they left us. With a full price in blood and treasure they bought this freedom for their children, and I do not know one tolerably decent American who would sell even his single right on any terms whatever. At the critical period in the history of Louisiana which occurred last year it was especially valuable to her people, for it furnished them the only legal, peaceable, and safe measure of relief from the exactions of a most corrupt and oppressive government. The successful scheme to cheat those people out of their votes for State officers and presidential electors is, therefore, a crime of the greatest magnitude, and one which requires a cheek of solid brass to defend it without blushing. It is far worse than a conspiracy to steal any amount of public money. Running crooked whisky for a lifetime would be an act of white-robed innocence in comparison.

The ultimate object of this crime gives it a general aspect revolting in the last degree; but its features, when seen in detail, are hideous beyond expression. Some returns were entirely suppressed, and others were altered; votes actually cast were thrown out, and others put in and counted which were known not to have been polled. The whole proceeding was full of false pretenses. Forgery of the most important documents was a part of it; perjury and subornation of perjury attended it at every step. Shall these things be forgotten or condoned? Do you expect the cheated people of the nation to say, like the eight commissioners, that this is as good a way as any to elect a President?

One of your allegations is that I intended "to convey the false impression that the formation of the Commission was the result of a Republican conspiracy to fraudulently elect a President and Vice-President"; and Judge Bradley, taking your word for it, has made himself interesting by a public complaint of the injury to himself. I did not say this or anything like it. On the contrary, I referred to the Commission as being proposed in certain difficult circumstances to avoid the dangers which might spring from a continued and final disagreement between the two Houses, and as being accepted by the Democrats in the belief that justice would be done, and an honest decision rendered against the fraud. In all this there is nothing about a conspiracy in "the formation of the Commission." I do not know that you misrepresented this point willfully. It is one of your characteristic inaccuracies, like that which charges Dante with the indecencies of the "Decameron."

No; the conspiracy was not in the formation of the Commission, but in the frauds which fabricated and returned those bogus votes. The Commission refused to verify the vote and ascertain whether the



electors that sent them up were duly appointed or not, and in this it bitterly disappointed the friends of truth, and grossly violated the whole spirit as well as the letter of the law which gave it being. Whether this was mere error or something worse, is not for me or you to determine; but the general judgment will, no doubt, adopt the charitable view which I have given, and say that the faculties of the majority were too much benumbed by party passion to see the facts or understand the law.

You claim that the certificate of the Returning Board gave you a "political advantage." In this you are certainly right. A party sued for an honest debt has a great *advantage* over his creditor if he can produce a fraudulent or forged receipt upon the trial. The *advantage* becomes decisive if the tribunal trying the cause is willing to accept the false paper, give it the effect of a true one, and permit the plaintiff to be cheated out of his debt. But would it be right, legally or morally, for the debtor to *take* such an advantage?

Your technical argument in favor of the fraud deserves notice, because it is almost your only attempt at reasoning, and because your conclusion would be fair if your premises were sound.

You declare, in broad and unqualified terms, that the American people have "no right to elect their own Chief Magistrate"—that no such right is imbedded in the Constitution or elsewhere—that, on the contrary, "the framers of the Constitution were careful to exclude from the people the right to elect their own Chief Magistrate." I admit that this, if true, ends the controversy in your favor; for it can not have been legally wrong to defeat the attempt which the people made to exercise a right from which they were carefully excluded by the Constitution. But this opinion of yours is a total misconception, and will not be adopted by any human being who has the faintest idea of our institutions.

You put your proposition with even more directness and speak with unwonted precision when you say, as you do on the same page, that the people of Louisiana and Florida have not the power to appoint electors of President and Vice-President. This goes to the root of the matter. It proves logically enough that the election at which the Tilden candidates were fixed upon, chosen, appointed, and named as electors, was a mere abortion—a vain effort to perform a function *ultra vires* and merely void. The Returning Board and the Electoral Commission were justified in treating it with contempt. Of such an election it was no harm to falsify the records; for in their best estate they had no value or validity. To forge them was no crime, for it prejudiced no right.

But is it true that the people of Louisiana and Florida have no power to appoint electors? You deny the power of the people to appoint, because that power "is by the supreme law of the land (mean-



ing the Federal Constitution) vested in the States, to be exercised in such manner as the Legislatures thereof may direct." Now, the Legislatures of the two States have directed that the power shall be exercised by the people, and this makes their right as clear as if the legislative enactment had been textually inserted in the Constitution of the United States. No argument is necessary to make this intelligible to a man of ordinary sense. There is the Constitution and there are the laws of the States; "he that runs may read," though, under the circumstances, I suppose I must not allow myself to say that "a fool can not err therein."

It is hardly possible to imagine anything more preposterous than your notion that these laws, which give the power of appointment so distinctly and so exclusively to the people, do *not* give it to them because a Returning Board is authorized to collate the votes, add them together, and ascertain what choice the people have made; that the power to inspect the record of the election and certify the result is the power to elect; that the right of the people to choose their State officers and presidential electors is only the power to send up names to the returning officer, who may choose them or reject them at his pleasure; that when the people have made one appointment, and the Returning Board another, the latter is the due appointment, and the former no appointment at all.

I will not trouble you with judicial decisions on this point, or with arguments derived from the established canons of construction, for they would make no impression on your mind. But I think I can stagger you by citing the authority of those mighty jurists and statesmen who until recently ran the government of Louisiana so much to your admiration. All of them, without exception, and "without distinction of race, color, or former condition of servitude," conceded the exclusive right and the unqualified power of the people to appoint electors of President and Vice-President for their State. This concession was not only made in words, it was avowed in every act they performed, from the beginning to the end of their domination. When Kellogg and his associates wanted the appointment of electors, they asked the people for it, and they acknowledged in a thousand forms that the people alone could give it. The returning officers themselves never denied the power of the people to choose and appoint whom they pleased for electors, as well as for Governor, Lieutenant-Governor, and other State officers. Their certificates, whether false or true, did not pretend to be *proprio vigore* an appointment. Every one of these papers purported on its face to be a mere declaration of the appointment previously made by the people. No candidate who obtained one of them ever undertook to use it except as evidence of a pre-existing right derived from a popular vote in his favor. The monstrous doctrine that the Returning Board could create title



to an elective office was never even broached, unless to be universally condemned as untenable. It is a pity that in your long, frequent, and affectionate intercourse with the negroes and carpet-baggers at New Orleans you did not pick up a little knowledge of constitutional law.

Failing to find any justification in the law for those who did this deed, you must leave them without an excuse, or find one in the facts of the case. Your demurrer is a preposterous sham, and you must answer over, Was the true vote of Louisiana counted or not?

The great fundamental fact which underlies all others in regard to Louisiana is, that the State, by her qualified voters, chose and appointed the Tilden electors in due and legal form. This is proved by evidence clear and decisive enough to strike all contradiction dumb.

In less than two days after the election, it was known all over the country that in Louisiana there had been a full poll and a heavy majority for Tilden. Very soon afterward the official count, made and recorded in the several parishes by Republican officers of the election, were brought together, and the exact vote of each candidate was ascertained. The figures could not be made to lie, and all parties agreed that the majority for the Tilden electors averaged nearly eight thousand. Now, remember, this was a public act, not done in a corner, but transacted in the face of the world; and the uncontradicted report of it carried perfect conviction along with it. Upon evidence of this kind the most important fact in the history of the universe was accepted as true in all parts of the earth immediately after it happened, and for more than eighteen centuries the most powerful minds in Christendom have staked upon it their highest interests in this world, and their salvation in the next. But there was other evidence. Committees of Congress were sent down, charged with the special duty of inquiring into the matter on the ground, and they reported the true result of the election to be as previously stated, that is to say, 7,659 majority for Tilden. Even that is not all. The original documents and records showing what the vote was, as actually counted by Republican Commissioners of Election, authenticated by their sworn certificates, and verified by the oaths of many credible persons, were produced before Congress and before the Electoral Commission. These were conclusive proofs; they were submitted to your inspection, and, if you do not know from them that a large majority of the people at that election voted for Tilden electors and the Democratic State officers, you are wholly unfit for your business. But you do know it, and can not deny it without totally destroying your character for common veracity. Forced by the irresistible strength of the proofs, you admit or (to use your own words) assume that the majority for the Tilden electors was 7,659. So, therefore, that is settled.



There is another point of fact that is also established. The majority for the Tilden electors was made up by the votes of legally qualified citizens. I do not say this merely because the reception of the votes by the proper election officers was *per se* an adjudication in favor of the voters' right, but for the further reason that the election at all the polling-places was in the hands and under the complete control of the opposing party, who would certainly not permit any Democratic vote to go in if they could legally keep it out. Besides, the House Committee, when they went to Louisiana with power to send for persons and papers, could not find anybody—not a carpet-bagger or a custom-house officer—hardy enough to assert that the Democrats had polled illegal votes. You have not denied, and I suppose will not, that the majority of 7,659, which you admit was cast for the Tilden electors, was cast by properly qualified citizens.

Another thing: the election was free and peaceable. The officers reported no disturbance. Every polling-place was manned by policemen, deputy-marshals, and soldiers in the interest of the carpet-baggers, and all of them testify that there was no violence of any kind which called for their interference. The same is true with regard to the registration. That there could have been no force or intimidation at other places, or times, which kept people away from the election is proved by the large number that came. The vote was the heaviest ever polled in the State; and larger in proportion to the whole population, as ascertained by the census, than in most other States where all the exertions of both parties were used to bring out their last man.

The necessary result, briefly stated, of all the facts known and proved is this: That the people of Louisiana, having the undoubted power to choose their own electors, did regularly, duly, and legally appoint the Tilden candidates upon a full poll, at a free election, and by a large majority; and the persons thus duly appointed by the people were exclusively capable of casting the presidential vote of the State. It followed, as the day follows the night, that the count of the eight electoral votes from Louisiana for Hayes was a false count.

But you say that the officers of the Returning Board, by virtue of certain judicial powers conferred on it, could disfranchise the majority, nullify their act of appointment, and virtually take the power of choosing electors into their own hands. This brings us to another disputed question of law: Is the Returning Board law valid and binding, or a mere nullity because of its direct and palpable conflict with the Constitution? Let us look.

Of course, neither you nor anybody will deny that disfranchisement of a free citizen is a severe punishment, reserved by the penal law for the most infamous crimes. To inflict it is an exercise of the highest legal authority. The judicial power in Louisiana is exclusively confined by the State Constitution to certain enumerated courts, and the



Returning Board is not one of them. Therefore, an act of the Legislature which gives to such a board *any* judicial power to punish *any* person for *any* offense is clearly void. But, in addition to this, it is provided by the fundamental law of all free States, including Louisiana, that even the courts or magistrates capable of holding this power shall never exercise it, except upon formal accusation and due conviction, after a regular trial before an impartial jury. Now, the legislative act, which you assert to be constitutional, gives the power to punish by disfranchisement to the Returning Board, which is not a court, and authorizes it to pronounce sentence of disfranchisement upon all the citizens of a parish at once, for an act of violence not committed by themselves or by any of them, but by somebody else whom they may never have seen or heard of. Even the fact that violence was committed by other parties is to be ascertained, not by a trial, but by an inquiry conducted in secret, behind the back of the parties, on *ex-parte* statements of their political enemies. The sentence is to be carried remorselessly out, though it have the effect of remanding the whole people of the State back to a hopeless bondage, from which they are struggling to be free.

Such a law you declare to be constitutional and valid! There is not a half-grown boy in the country of average understanding that does not know better. I can not help but believe that a little reflection would have saved even you from the shame and folly of making an assertion so destitute of all sense and reason.

But you go further. You not only aver that the power of the Legislature to pass such a law can not be doubted, but you declare that the Supreme Court of Louisiana has adjudged it to be valid, that is to say, consistent with the Constitution. This is extremely injurious to that court, and, if believed, it would destroy all confidence in the integrity of its judgments. Knowing something of its members, I take leave to say that they are utterly incapable of making a decision at once so false and so absurd. In fact, they did not. No case ever came before them involving the question, and no dictum ever fell from either of them which could give the Returning Board or its owners the least hope of being sustained as a constitutional body.

This falsification of a judicial decision, to uphold the power of the Returning Board in fabricating election returns, has a curious history. In November last, Mr. Stanley Matthews, in a published letter, said that the Supreme Court of the State had decided the Returning Board Statute to be constitutional. He was immediately picked up by nine Louisiana lawyers, who told him in a printed pamphlet that it was not true, and asked him with great politeness to correct the error. He was silent, but the visiting committee reasserted in its report substantially the same thing. Again it was met with loud and emphatic contradiction. Nevertheless, Mr. Sherman in the Senate afterward reaf-



firmed it, and had the temerity to hold up a book of Louisiana reports in which he said the decision would be found. Those who, for want of time or interest in the subject, did not examine the report, were in some sort compelled to believe what was affirmed about it by a Senator who professed to have carefully read it, and in consequence the reputation of the Louisiana court suffered severely for a while. But the misrepresentation soon became known for what it really was, and it was again thoroughly exposed, as you very well know. Now, after all this, here are you at the same work again, parading anew the citation proved to be false half a dozen times. The patient pertinacity of Pope's spider, reconstructing its web as often as it was swept away, is the figure that fits your case ; I will not quote the lines lest they offend you by their coarseness.

You transcribe a passage in which you tell us that the court has decided the validity of the statute ; but you are careful not to mention the case or the book from which you take it ; it is found, however, in the case of *Bonner vs. Lynch*, on page 268 of the 25th Annual. There is not in that passage, or in that case, or in that book, one word that alludes in the remotest manner to the constitutional question or the power of the Legislature to pass such a law. The case, being examined, shows that no such point was raised by the record, or discussed by counsel, or adjudicated by the court. The sole question was, Whether the court had authority to revise the proceedings of the Returning Board and correct its errors. Four judges concurred in the opinion that, inasmuch as no statute expressly gave them that power, they could take no cognizance of the subject, for want of jurisdiction *ratione materiæ*. You might just as well cite that case to prove the constitutionality of the Reconstruction law.

You claim that this same case not only establishes the *validity* of the act creating the Returning Board, but the conclusive effect of its action ; whereas, in truth and in fact, the court holds the direct contrary, and says that a certificate of the board is merely *prima facie* evidence in favor of the person who gets it. How, indeed, could the court have done otherwise, seeing that the statute itself declares, *totidem verbis*, that the certificate shall be, not conclusive, but *prima facie* merely ? And here it ought to be noted that, where you profess to set forth the provision of the Legislative act which makes the certificate of the board evidence, you garble it shamefully and alter it to make it fit your assertion that it is conclusive, by cutting out the words which declare it to be only *prima facie*.

I am not sure that you have made these misstatements with malice prepense :

" But wrong is wrought for want of thought,  
As well as want of heart."

You utter whatever comes uppermost, if it seems to serve your purpose, without stopping to consider whether it is right or wrong. Added to this, you have the dangerous gift of talking on a subject you know nothing about just as well as if you understood it. This combination of mental qualities gives you a matchless skill at blundering :

“As expert divers to the bottom fall  
Sooner than those who can not swim at all,  
So, by this art of writing without thinking,  
You have a strange alacrity in sinking.”

Besides this, the obliquity of your moral vision prevents you from seeing either facts or principles as they are seen by others. You have no doubt that Wells, Anderson, and the two mulattoes, when they corruptly altered and falsified the election returns, “exercised a wise discretion.” The manifest sincerity with which you make your confession of this singular faith marks you out for the fittest man that could have been found to serve the Great Fraud by blaspheming the Constitution of a free State, mutilating her statutes, and imputing to her judges absurd decisions which they never made.

But let that pass. We will now assume that the Returning Board was a constitutional body, vested with all the power you claim for it, and also that its certificate is conclusive. Does it follow that its action is binding, if it be fraudulent? No : a tribunal with full jurisdiction has no more power to commit fraud than a private citizen. A judgment of the Supreme Court of the United States, upon a matter clearly within its authority, is utterly void if tainted with corruption. No paper of any kind, no official certificate, no deed, no record, can weigh a feather in the scale of justice, if it has been concocted in willful falsehood, or procured by actual deception. Such a paper or record, when produced in evidence, has precisely the same probative force as a forgery : neither more nor less. In saying this, we are backed by the good sense and honesty of all mankind, and by rules of law that are universally accepted. Nobody has yet dared to deny this principle. No Republican counselor met it in argument when the Democratic counsel set it forth ; none of the Eight responded when all of the Seven presented it. Even you, with all your “strange alacrity in sinking,” can not get down low enough to contradict it.

Any court, any legislative body, any commissioner or arbitrator, who receives a paper known to have been fraudulently made, and gives it the effect of a true one, or adopts it as the foundation of a judgment, or allows it to prejudice any opposing right, commits a most scandalous outrage upon law and justice. The principle which excludes a document tainted with that kind of iniquity is fundamental, axiomatic, and necessary to the safety of all rights, public as well as private. It is of universal application, impregnable, unassailable,



without variableness, or shadow of turning. It stands now as it has stood since the beginning of the world,

"Whole as the marble, founded as the rock,  
As broad and general as the casing air."

The Electoral Commission was constituted with authority, clearly defined, to determine a certain controverted matter of fact; to wit: Whether Kellogg and his seven associates had been duly appointed electors by the people of Louisiana or not. To maintain the affirmative side of that issue, the certificate of the Returning Board was alone relied upon. The eight commissioners, against the solemn protest of their seven brethren, accepted that certificate and held it to be good, nay, conclusive, proof of the fact averred, although it was, and they knew it to be, not only tainted, but saturated through and through with the most atrocious fraud, and therefore as corrupt in morals and as void in law as the nakedest forgery that ever was made.

Thus it came to pass that this great cause, involving the title to the highest office in the Republic, was determined falsely, upon evidence which no justice of the peace would receive in a suit for the price of two sheep. In one of the regular courts of the country, upon a trial for land or money, the mere offer of such evidence by counsel, knowing its real character, would be extremely dangerous. It would not only be rejected, but the guilty counselor would be punished, not in the same way (for there is a technical difference), but on the same principle, that courts punish the utterance of counterfeit money. To pollute the administration of justice, by passing false and fraudulent documents upon a court, is indeed very much worse than "showing the queer" upon a shop-keeper.

Of course, the wickedness of all this depends on the *scienter*. Involuntary ignorance would be an excuse. But the corrupt character of this certificate was known to all the world, and, being a public fact, the commissioners as well as everybody else were bound to know it; besides that, the evidence was exhibited to their eyes; their rejection of it assumed it to be true; and they expressly ruled that no proof of fraud, however clear, would diminish the value of the false paper in their estimation. So far as I am informed, they have never pretended to be ignorant of the fact that this vote was the offspring of a fraudulent conspiracy, nor have they denied the law, which makes it void for that reason. There is, therefore, nothing for it but to leave their reputation for judicial integrity, as Bacon left his: "to foreign countries, to future ages, and to men's charitable speeches."

The eight commissioners and the counsel on their side tried to frame a weak excuse for this dereliction of duty by reasoning thus: Congress gave the commission no power but what the two Houses might have exercised themselves; the two Houses had no authority to



revise election returns from any State; *ergo*, the commission must receive a false, fraudulent, and void certificate as if it were a real return, true and valid. In this syllogism the premises, *major* and *minor*, are unsound, and the conclusion is a *non sequitur*. Congress has power, clear and unquestionable, not to revise the action of the State authorities for the purpose of correcting their mere errors, but to ascertain whether a paper pretending to be a return is a real return or a fraud. If the two Houses are to count the votes, they must have the verifying power which enables them to determine what are votes and what are not. A fraud or a forgery is not a vote. This verifying power was delegated to the commission with directions to ascertain by it who were duly appointed. The majority did not decline to exercise the power; they assumed it, took it and executed it, but they misused and abused it so as not to verify, but to falsify the vote.

You invoke the name of Judge Church, the present Chief-Justice of the State of New York. If that distinguished, upright, and learned gentleman is on your side of this controversy, I admit that the Great Fraud has a most powerful friend. But your claim that he favors your doctrine is *prima facie* evidence that he is against you; for, in citing authorities, you are nothing if not deceptive. You give us a single sentence which you say is his, but you do not tell us whether it is from a judicial opinion, a published letter, or the report of an oral conversation. Knowing "the sin that doth so easily beset you," I venture to say that this quotation is in some way false: either you have made it out of whole cloth, or torn it from its context, or else made an application of it which the author never intended. Let us look at it.

You make the Chief-Justice say, that "the authentication of the election of the presidential electors, according to the laws of each State, is final and conclusive, and that there exists no power to go behind them." This sentence, with its bad grammar and opaqueness of expression, is not like Judge Church's clear and accurate style. But he may have said that the results of an election, *honestly* authenticated by the proper authorities of the State, according to its laws and the Acts of Congress, ought to be accepted as final and decisive of all antecedent disputes about it. That is no doubt his opinion, and I firmly believe him to be right on this as on other questions of law. But does it follow that a fraud or a forgery may be regarded as a proper authentication? Have the two Houses of Congress, when they come to count the votes, no right to distinguish between a true paper and a paper void for manifest corruption? Ask Judge Church to say for your comfort and assistance that Congress or any other tribunal may lawfully receive, and treat as true, a false paper, known to have been concocted in willful fraud. Instead of gratifying your wish, he will make the tenderest vein in your heart ache with his contempt.



Many persons are of opinion that you did not write the article to which your name is appended. There is intrinsic evidence that certain parts of it were not produced by you; for instance, the defense of the carpet-baggers, which certainly nobody but one of their own number would make now, since the Administration at Washington has deserted them, and—

“From their ruined fortunes their familiars slink away.”

But you are made to appear as a believer in the virtue of the knaves who almost desolated Louisiana by their exactions, taxed property to a point that made it almost worthless, issued innumerable millions of fraudulent bonds, reduced public securities to forty per cent, patronized larceny all over the State, and left the people to the protection of no law but Lynch law. The writer could not ignore these enormities, for he manifestly had read—what you probably never took the trouble to look at—the reports made to Congress by Messrs. Potter, Foster, Wheeler, Phelps, and others, which establish the facts incontestibly. It was a sin and a shame to make you express admiration and respect for these unmitigated scamps, and, facile as you are, I wonder that you submitted to it. They might have spared you this degradation. Was it not enough for you to have said that the rascality of the Returning Board was “the exercise of a wise discretion”?

You, or somebody for you, have undertaken to repeat the amazing argument that the Returning Board and the Electoral Commission were right in disregarding the popular vote and setting aside the election in Louisiana (free, full, and fair though it was), because numerous murders had been committed in the State during the period of carpet-bag rule. It was alleged that these murders had been going on steadily for years, at the awful average of about four every day, and though the perpetrators of them were well known, the public authorities had not taken measures to punish a single one. Nobody was hung or tried or even arrested. I did not believe this story. It was denied on good authority and supported by no credible evidence. But I insisted that, if it was true, the people were right in turning out officers who suffered such a state of things to exist, and electing others who would protect life by a faithful execution of the laws. It did seem to me like a new species of moral insanity to say that the law-abiding and honest citizens of the State should be disfranchised because they had cast their votes against officers who, besides being public plunderers, had taken away all security for life by permitting four thousand murders in three years to go entirely unpunished.

Upon this you assert, or at least sign your name to an assertion and publish it in a magazine as yours, that I *admitted* the perpetration of the murders referred to; that I *justified* them, alleging that the *State government was too weak* to punish or prevent them.



This represents me as the most inhuman monster on the earth. A man who would justify the unprovoked assassination of four thousand peaceable and helpless persons, including women and children, on the mere ground that the government was unable to prevent it, would not hesitate to commit murder himself whenever he could do it with impunity. This odious charge is pressed upon me explicitly, and repeated in many forms through several pages of violent denunciation. Now, mark my answer well. The man who wrote this part of the article which passes for yours is a base impostor. Every opinion, thought, and sentiment expressed by me is *precisely the reverse* of what he imputes to me. I pronounced the story of the four thousand murders what I did then, and do still believe it to be, a sheer fabrication got up to order for partisan purposes. So far from justifying those murders, I declared that, if such outrages had really been committed, the carpet-bag authorities of the State had made themselves infamous by their failure to punish them. Furthermore, I averred, as matter of fact, and showed it very conclusively to be true, that the State government was armed with physical power amply sufficient to enforce the law, preserve the peace, and protect life. All this I said, not in doubtful or obscure language, but so plainly that no man with intelligence one degree above that of an idiot could misunderstand me.

The direct, straightforward mendacity of this effort to defame me is literally wonderful. I speak soberly and without passion, when I say that I think there is nothing like it on record. No reader will be able to conceive the grossness of it without comparing your article at pages 225-227 with mine at pages 9-11. Even then he will not understand it unless he looks narrowly at the passages which the writer pretends to copy from me. They are *all fraudulently changed and altered*. My disbelief in the murder stories of Sheridan and Sherman, my detestation of those crimes if they were in truth committed, and of the government which could punish them and did not—my unequivocal expression of these sentiments are suppressed and excised from the passages quoted. Disconnected sentences are picked out from different places, mutilated, transposed, and then joined together as if I had written them continuously in that order, whereby the whole sense and meaning of my words are perverted. I am made out to be an apologist for murder and mob violence, just as you might prove from the Bible that there is no God. This is not an indictable forgery, but many a man has served out his term at Sing Sing, who would scorn an attempt to ruin his neighbor by the fraudulent making or alteration of a paper writing to the prejudice of his character.

I am told, and I incline to believe, that you did not write this part of the article which passes for yours. Some smart carpet-bagger put it together, and gave it to you, to try how much he could make you



disgrace yourself for his amusement or his malice, and you put your name to it without knowing whether it was right or wrong. This relieves you from the imputation of deliberate falsehood ; but why, oh ! why were you silly enough to become the cat's-paw of such a mischievous monkey ?

I have spoken mainly of the Louisiana case, because that is the one of which you ought to have some special knowledge. You have, however, gone into Florida, and tried to defend the decision in favor of that fraud. As might have been expected, you make a bungle of it. I will restate the points as held by the Commission so far as you attempt to indicate them.

Professing to vindicate the great principle of State rights, the Commissioners forced upon Florida electors whom the State had rejected when she made her own choice, and against whom all the departments of her government had protested. The fraudulent nullity manufactured by two canvassing officers was allowed to outweigh the will of the State, as expressed by her executive, her Legislature, and her courts, as well as the solemn voice of her people in their primary capacity.

The Commission invested the canvassing officers with judicial authority, and held that their certificate was the decree of a tribunal. It is perfectly certain that by the law of the State the canvassing officers have no such power. The act of the Legislature does *not* give it to them, and the Supreme Court of the State had decided in the most emphatic manner that their duties were purely ministerial.

The Commissioners went another step. Two clerks being metamorphosed into judges, contrary to the law of the State, it was next maintained that their fraudulent act was as good as an honest judgment, and this was against the law of the whole civilized world.

All the questions of law and fact controverted before the Commissioners, with reference to the vote of Florida, had been adjudicated by a State court of competent jurisdiction in a cause between the same parties. It was not open to another hearing. But the eight Commissioners, reckless of their plain duty, or not understanding it, though warned by their brethren, made a decision diametrically opposite, and the fraud that had been legally crushed was restored to another life.

It might be possible for a very ingenious man to gloss over these anomalous rulings with some appearance of plausibility. But your argument only sets them in a worse light. Your weak and awkward defense of them will convince any intelligent man who reads it that they are wholly indefensible. If the Commissioners were not ashamed of their errors before, they must have blushed when they saw them supported by such twaddle as yours.

You are naturally offended by my reference to the conduct of Mr. Sherman's visiting committee, of which you were one. You call it

an attack ; but I meant it for the best defense I was able to furnish ; and I will not now be provoked to utter one harsh word about them. I am willing to admit that, when I said they " aided and abetted, *by every means in their power*, the perpetration of the Great Fraud," I used too strong an expression.

Their case is too serious to be dealt with lightly. So far as depends on me, I will not suffer them to be prejudiced by your blundering advocacy. But they have hurt *themselves* very much by declaring insincerely and untruly that they went to Louisiana only to *witness* the count of the electoral vote by the Returning Board. Nobody believes that they would drop their affairs at home, start immediately after the election, travel all the way to Louisiana, and stay there at great expense for a month, merely that they might be present as *spectators* when Wells, Anderson, and the two mulattoes would cypher up the returns. No ; they meant business of some kind, good or evil, and evil is always suspected of that which covers itself under a sham. Another pretense of theirs fails to bear examination. They said they could not advise an honest count or reprobate a false one without fear of offense to the returning officers. This extreme delicacy is all simulated. Nothing could be more ridiculous than the idea that the committee was restrained by politeness from interfering to stop the fraud, if they wanted it stopped. They *could* have crushed it with a word. If they had simply said that an honest count must be made of all the legal votes actually cast, and that no man should, with their consent, be recognized, protected, or rewarded for falsifying or fraudulently altering returns, the conspiracy would have dissolved that instant. Their refusal to do this or something equivalent, when pressed and solicited by the Democratic committee, needs to be vindicated by some better reason than any that has yet been given.

They not only did not prevent the Great Fraud when they might have done it so easily, but they encouraged it, intentionally or unintentionally, by telling the conspirators that power to disfranchise the citizens of the State might constitutionally be exercised by the Returning Board ; and to give this plausibility they cited a void statute and a decision of the Supreme Court which had never been made. By reasoning wholly unsound they made the conspirators believe that if they put their fraud into the "forms of law," it could never be questioned.

Moreover, after the fraudulent alteration of the vote had been made, they pronounced it a righteous thing. How far they were conscientious in this, I do not pretend to say. But if a man approves of a consummated crime, it does not require much faith in human weakness to believe that he might have helped it along while it was yet *in fieri*.

Again : the chairman of the visiting committee has since become



Secretary of the Treasury, and controls the appointment and removal of custom-house officers at New Orleans as well as elsewhere. Wells is Surveyor of the Port, and Anderson is Deputy Collector. Are these offices the consideration, in whole or in part, of their corrupt service in the Returning Board? What other claims to those lucrative and highly responsible places could be preferred by this brace of detected criminals?

Though these facts make an impression very unfavorable to the committee, they are but moral circumstances. The public is *not yet* in possession of any direct evidence which shows either of them to have actually participated in concocting perjured affidavits, bargained for falsified records, or made special promises of reward for corrupt services. All of them are men of good general reputation; most of them stand so high that a charge against them of willful dishonesty, unless supported by overwhelming proof, must be rejected as incredible. Some, perhaps, were tied to the tail of the committee who had not knowledge enough of the subject to make them fairly responsible for what they said or did. You yourself are in no danger if you get proper credit for your mental imbecility; at least I think it can be easily shown that great allowance ought to be made for you on that score.

I come now to your abuse of the Buchanan Administration. It is as difficult to analyze as the scolding of a fish-woman. But out of your reckless and half-crazy circumlocution I am able to extract the following charges:

1. That the President and other members of the Administration were in favor of the secession movement, and desired its success.
2. That to make it successful they, and particularly the President himself, behaved treacherously and unfaithfully to the Federal Government.
3. That the President combined with secessionists in the treasonable plot to break up the Union, establish an independent Southern Confederacy, and cause it to be recognized as a separate nation by foreign governments.
4. That, in pursuance of this plot, and to carry it out, the President not only abandoned but denied the right of the Government to preserve itself or to maintain its authority, or to execute its laws, or to put down resistance by force.
5. That, as a consequence of these and other evil deeds, the Buchanan Administration became accursed as the cause of the Civil War, with all its loss of blood and treasure.

I will not now write an essay on the history of that period, or go into a general explanation of the events which took place on the eve of the war. I am wholly on the defensive, and my present duty is merely to state certain facts already well known, and which show that your charges are false and groundless.

Mr. Buchanan's regular message of December, 1860, addressed to a Congress in which all the Northern and Southern States were represented, is an unanswerable argument against the right of separation, and the most powerful appeal for union and harmonious obedience to law that ever was made to the American people, excepting, perhaps, Washington's Farewell Address and Jackson's Proclamation. No one can read it now without feeling that if his wise counsels had been heeded, the unity of the Republic would have been preserved in the bonds of a lasting peace.

Only those who know, of their own knowledge, what relations actually existed between the Administration and the leading advocates of separation, can see how preposterous is the charge of a conspiracy between them. For many Southern gentlemen the President, no doubt, had a warm affection which it was not easy to tear from his heart; and their attachment to him had been long and faithful. But the moment he assumed his public attitude of opposition to their movement, they fell away from him in a body and became his unanimous enemies, as far as they could be so consistently with their respect for his acknowledged personal virtues. Even the Southern members of his cabinet could not reconcile it with their principles to hold office under him. The great gulf, soon to be filled with blood and fire, was already opened. The Administration was on one side of it, and all secessionists on the other. Does that look like a combination to effect a common purpose by concert of action?

Not less absurdly false is the charge that the Administration denied the power of the Federal Government to maintain its just supremacy by force.

We held not only that no right of separation existed, and as a logical consequence that all State ordinances of secession were mere nullities, but we claimed for the Government of the Union the right to save its perfect integrity by the use of all the physical force which might be found necessary. This power was given by the Constitution itself, according to our exposition of it, thus:

To take or retake and keep possession of all forts, arsenals, dock-yards, custom-houses, post-offices, land, and other public property of the United States; to collect the duties, imposts, and taxes wherever due; to execute the laws, by enforcing the judgments of the Federal courts, and the legal orders of all Federal officers, and to do this by military power wherever the civil authority is not strong enough: these are the coercive powers bestowed on the General Government for its own preservation, and these, instead of being abandoned by the Buchanan Administration, were most distinctly asserted.

What we did deny was, the right of the United States to make war upon a *State as a State*, declare all the inhabitants beyond the protection of law, and put them all to the sword as public enemies, for



theoretical heresies expressed by a few of them, in the form of void ordinances. We thought, as Washington, Madison, and Jackson thought and said on similar occasions, that the force which supported the law ought to be directed against the individuals who opposed it, and not against innocent persons who happened to live in the same State.

The United States, being (within certain limits) a sovereign Government, to which obedience was due directly from the people, it took no notice of State lines, and could not make war upon a State any more than a State could make war upon a county. The opposite doctrine, which would interpose the State between the people and the Federal Government, was the doctrine of the secessionists, which we rejected as unsound and heretical.

If the Executive had at that time opened an indiscriminate and aggressive war, it would not only have been lawless murder, but it would, as every one now can see, have ended in complete disaster, and the cause of the Union must have utterly perished.

The executive function is confined by the statute-book, as well as the Constitution. The President could not, and he said plainly that he would not, violate his oath of office by usurping powers which the law withheld from him. But Congress could give him all that was needed. It did not do so. On the 9th of January he sent in a special message, describing the dangers to which the Union was exposed by the inaction of Congress, and showing the inadequacy of his means to control the rising revolution. Congress would not vote a man or a dollar, nor in any way strengthen the executive hand.

That these views of legal and constitutional duty were true and right is not open to the slightest doubt. Except the Southern members who retired, all the Cabinet fully and heartily concurred in them. General Cass, General Dix, Mr. Holt, Mr. Stanton, Mr. Toucey, and Mr. King were as true to them as I was, and of course supported them with much greater ability. We differed several times with one another and with the President, on points of policy; but on the law we were of one mind and one heart. Our exposition of it was not, to my knowledge, thought or said to be erroneous by any member of that Congress. Our successors, of the Lincoln Administration, adopted it in all its length and breadth. To this day no lawyer of average ability has ever fairly considered it and then candidly put in a dissent. It is so manifestly correct—so simply just, and right—that all men agree to it.

Such being the true state of the case, as the record shows, you assail the Buchanan Administration with filthy abuse, and charge Mr. Buchanan himself, not only with entertaining opinions totally different from those he actually held and expressed, but with criminal acts of the darkest dye.

Apart from the palpable falsehood of these accusations, your attempt to criticise a man like Mr. Buchanan is unpardonably presumptuous. Your judgment upon his character or conduct, even if honestly expressed, is not worth a straw. Doubtless he had his share of imperfections; but how could you tell his faults from his virtues? You believe that the fraudulent alteration of election returns to cheat a nation is the "exercise of a wise discretion"; you believe the Louisiana returning law to be just and constitutional; you believe it right to quote a judicial decision for a principle which the case does not contain: how, then, can any moral standard of yours be applied to a statesman whose life was upright, pure, and patriotic? Your faith in, and affection for, the carpet-bag knaves makes it a necessity of your nature to vilify Buchanan, who was in all things their opposite. His intellectual as well as his moral superiority puts you so widely apart that you can never know anything whatever about him. I do not wish to exaggerate his magnitude or your littleness; and I could not if I would try; for no comparison of mine can describe the difference between you. Hyperion and a satyr; the towering eagle and the mousing owl; the King of the Titans and the dwarf at his foot; the builder of the solemn temple and the fly on one of its columns—none of these trite similes gives an idea of the immeasurable distance which separates you from him. Nobody expects the scurvy politician, who busies himself fixing up false election returns, to understand the thoughts, motives, or acts of the incorruptible magistrate whose walk is on the mountain ranges of the law.

Let us look for a moment at your method of supporting the charges you make, and see how worthy it is of you and your carpet-bag associates. In substance, your accusations are that he and his Administration, being in complicity with treason, favored the right of the States to separate from the Union at pleasure, and, in the interest of the seceding States, denied the power of the General Government to maintain its authority by force. The message honestly quoted proves exactly the reverse. But you suppress all that it contains upon those subjects, and quote certain sentences relating to a totally different matter, namely, the right of the General Government to make aggressive war upon a State, and all the people thereof, without regard to their personal guilt or innocence. Because he shows that the Constitution has wisely withheld *this* power from both the President and Congress you say that he abandoned and denied the other powers which, in fact, he asserted and claimed in that same message.

I do not ask if this be a fair way to defame a man whom death has disarmed of the power of self-defense, for I suppose that, in your eyes, it is eminently proper. You have no doubt that it is "a wise discretion," like that of Wells and Anderson when they transposed the figures on the return from Vernon Parish. The trick, to be sure,



is perfectly transparent ; but your mental caliber is just small enough to let you think that even a detected falsehood is better than none.

Nor would I advise you to cease your vituperation of the dead President. His memory is intensely hated by many powerful persons to whom his dignified and virtuous life was a constant reproach. To slander him is the surest way to curry favor with them, and they can assist you to get a foreign mission, or some other office for which you are equally unfit. Lose no opportunity, therefore, of being super-serviceable. Take every occasion to load up as much dirt as your little cart can carry, and, however far it takes you out of your way, drive around and dump it on the grave of Buchanan. It will not disturb his repose, and no doubt it will increase your chances of promotion very much.

It is always more or less awkward to speak of one's self. But you have dragged my individual life into this discussion, and falsely accused me of gross misbehavior. I shall make my defense with as little *egoism* as the nature of the case will permit.

You have positively averred, published, and proclaimed that I adopted the views of the secessionists, and entered into a "devilish cunning" conspiracy with them to destroy the Union ; that I brought the "accursed Administration" into this traitorous combination, expressed the opinion that each State had a right to separate from the Union at pleasure, and declared the Government destitute of all power to preserve itself by compelling obedience to its laws, with much more to the same effect.

To this I oppose my explicit denial. I declare that all you say about me in this connection is perfectly and entirely false, not only in its general tenor, but in every detail. No act that I ever did, no line that I ever wrote, no word that I ever spoke, can give the slightest support to any one of your charges. On the contrary, all my utterances, public and private, are diametrically the reverse of this.

Up to this point I have been willing to excuse you on the score of incapacity. You could not be expected to see the unconstitutionality of the Returning Board law, or the legal right of the people to choose their own electors, or the dishonesty of altering election returns, or the rule that fraud makes void whatever it taints by its touch. In quoting the Louisiana court to prove a principle which it did not mention, perhaps you only repeated like a parrot what others said before, without knowing what it meant. When you asserted the conclusiveness of the Returning Board's action on the authority of the statute, and a judicial decision, you may have omitted the words "*prima facie*" from your rendering of both, because you thought that *conclusive* and *prima facie* were synonymous terms. You probably did not write that part of your article which most falsely accuses me of admitting and justifying the murder of innocent and helpless



people by thousands. All your misstatements upon the Florida case could be accounted for by your lack of legal knowledge. Even your misrepresentation of Mr. Buchanan might be considered the unavoidable blunder of a narrow mind struggling with a subject beyond its comprehension. But this slander of me is a different thing. Giving you credit for as much ignorance as you can possibly plead, and making all allowance for the curious moral *strabismus* with which you are afflicted, still judgment must go against you, that *here* you have *willfully* broken the ninth commandment.

Manifestly you sought most diligently for evidence to show that I had been opposed to the Union, favored secession, and advised against the right of the Government to execute its own laws. The further you went in your search, the more proofs you found to contradict the calumny which you had predetermined to utter, and you found absolutely nothing, for nothing existed, to sustain it. But, true to the morality of the Returning Board, you resolved to *make* what you could not *find*. You took my opinion of 20th November, 1860, and there you saw an exposition of the subject precisely the opposite of that which you wished to impute to me. Then you falsified the record, suppressed what I actually wrote, and attributed to me sentiments which I never entertained or uttered. Your account of the paper and its contents is not only different from, but directly contrary to, all that is contained in the paper itself.

That is bad enough, but that is not the worst of it. In order to give some show of authenticity to your false version of my opinion, you pretended to transcribe a paragraph; but your transcript is basely fraudulent. Let any man take volume ix of the Attorney-General's opinions, look at this one on page 523, and compare your pretended copy with the original. You pick out sentences here and there from different places, and present them to your readers as if I had written them continuously. What you strike out is absolutely necessary to a proper understanding of what you leave in. A most serious and embarrassing difficulty had been brought upon the Administration by the resignation of all the Federal officers in South Carolina. The President, anxious to perform his whole duty, required my advice. Of course, I did not say that this was *casus belli* as against the State. We could not lawfully kill the whole population because our officers vacated the places to which we had appointed them. Military force might be sent there to aid the civil officers in executing the laws, but we must first have civil officers to be aided. For this I gave reasons which any one who reads the opinion will perceive to be entirely satisfactory. You make me talk nonsense about it; I seem to propound a question which I do not answer; to describe a difficulty without proposing any relief, and to draw a conclusion from no premises. Having thus deprived the passage of its real meaning, you ascribe to it a false one, and assert



that it contains sentiments inspired by "treasonable allies" of the Administration "in aid of the great rebellion."

In law this is not a forgery. But among men of average honesty the fraudulent alteration of a paper to injure another's character passes for about as shameful and base a thing as can be done. Let me illustrate by cases which I need not say are merely hypothetical :

Suppose yourself appointed to the mission you have sought so earnestly. You wish to ruin some man, or woman, by trumping up a false accusation against him, or her, and you try to do it by diplomatically misrepresenting the contents of a written document which you have in your possession and from which you make false quotations ; you are detected and exposed : what would be done with you ? All further intercourse with you would be declined ; your recall would be immediately demanded ; you would be kicked out of the country as ignominiously as the rules of international law would permit.

Imagine yourself in court as a counselor with a paper in your hand whose contents it is necessary for you to make known ; you misstate the whole tenor and purpose of it ; you pretend to read a part of it, but read it so falsely that the true sense of it is altogether obscured. If you are caught in the trick you are certain to be expelled from the profession.

Suppose another case : A Federal officer is impeached for being engaged in a conspiracy against the Government, and you, being a witness, testify positively that he is guilty because you have seen a paper written by the accused in which sentiments are expressed favorable to the conspiracy and hostile to the right of the Government to execute its own laws. Moreover, you produce a copy, made by yourself, of a paragraph, which you swear to be plenary proof of an intent to surrender the power of the Union to the conspirators. After that you are indicted for perjury, and it is proved that no such sentiment was expressed in the paper, but the direct contrary, and that your copy is a false copy, palpably made for the purpose of deception : would you have a defense ? Could you escape conviction ? If convicted, what would become of you ?

Of course, you have never done either of these supposed acts. I put the cases merely to bring the principle down to a level with your understanding, and to show you how dangerous is the practice you indulge in of falsifying documents and misstating their contents. When you see how it would work if carried out into other departments of business you will comprehend the iniquity of trying to fasten the highest crimes upon innocent persons, dead and alive, by such methods as you have adopted.

As to Oregon, it was not asserted before the Commission that anything criminal had been committed. The question whether Cronin or Watts was elected involved a doubtful and difficult question of law

on which there were different opinions and judicial authorities seriously conflicting. That Governor Grover decided it honestly, and according to his best judgment, there can be no doubt in the minds of reasonable and fair-minded men. The presumption that he acted with all due fidelity to the law is much strengthened by your assertion that he was guilty of "loathsome fraud." Your abuse of any man is very powerful evidence in his favor.

In like manner I take your diatribe upon Mr. Tilden and the New York Democracy. I know nothing of the matters you refer to; but I do not believe a word you say. Remembering your monstrous falsehoods about Mr. Buchanan; seeing the large, loose, and lavish mendacity of your charges against myself, and applying the maxim, *falsus in uno falsus in omnibus*, I can only regard your abuse of Mr. Tilden as strong proof that he is a just, upright, and honorable gentleman. Thus you furnish me with a cheap and easy mode of praising him. The chosen chief of the nation swindled of his right does not want any eulogy from me. But if I am called upon to show the grounds of his title to general respect and admiration I need not describe the irreproachable walk of his private life or his high public career—his brilliant eloquence or his solid judgment—his tireless struggle against corruption in the city of New York, or his beneficent administration of the State government—it is enough that I simply show your attempt to defame him; for that itself is a decoration of his character.

Your fling at Messrs. Field and Carpenter is hardly worth notice. Far as they stand above your reach, you attempt to malign their *motives* for opposing the Great Fraud; those of one you pronounce to be mercenary, and of the other "mixed and mysterious." They belong to a class of men who act habitually upon motives which must always be a mystery to you, for you can not comprehend them. You chuckle over the fact that their logic and eloquence was unsuccessful. That is proper enough.

The decision of the Commissioners gave to stupidity and fraud a great triumph over the honesty and ability of Messrs. Field and Carpenter, and in this triumph you have an unquestioned right to rejoice. You add that "their joint effort before the Commission was a *not inefficient aid* in preparing the minds of their auditors for the judicial result which followed." This seems to mean that, either from lack of faithfulness or want of capacity, they injured their cause by pleading it. But you would scarcely presume to pronounce such a judgment on men whose superiority over yourself is so marked and so well known. One other construction of your words is possible. The Commissioners were the auditors, and their minds were prepared to decide in favor of the fraud by the mere fact that Messrs. Field and Carpenter, Republican lawyers, appeared in opposition to it. Did the Commissioners indulge a feeling so unworthy? Did they prostitute their judicial



functions to satisfy it? Certainly no reasonable man can ever believe that, without authority much better than yours. But most probably you had no meaning at all. It is mere drivel, and only furnishes another proof that, when your masters at Washington intrusted you with the defense of the Great Fraud, they put the business into most incompetent hands.

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### THE THIRD TERM: REASONS AGAINST IT.

*“Resolved, That in the opinion of this House the precedent established by Washington and other Presidents of the United States, in retiring from the presidential office after their second term, has become, by universal consent, a part of our republican system of government, and that any departure from this time-honored custom would be unwise, unpatriotic, and fraught with peril to our free institutions.”*

This is a resolution passed by the House of Representatives on the 15th day of December, 1875. It was offered by Mr. Springer, of Illinois, after consultation with leading friends of the principle, and was carried immediately and almost unanimously, being opposed by the votes of only eighteen members out of two hundred and fifty-one. It received the support and approbation of all parties. Men who quarreled bitterly upon all other political subjects were of one heart and one mind when it came to be a question whether the custom established by Washington and other Presidents, of retiring after their second term, ought to be respected or could be safely departed from.

And now here, to wit, in the pages of this Review, comes Mr. Howe, of Wisconsin, and on the part of General Grant, for whom he appears, denounces the resolution aforesaid, impugns the doctrine embodied in it, and assails the integrity of its supporters in the most violent manner. I am asked, “Under which king, Bezonian?” Do I give in my concurrence? If not, what grounds of opposition can I presume to stand on? Believing in the resolution of the Representatives, and dissenting from Mr. Howe’s article, the readers of the Review shall have the why and the wherefore: not because my individual opinions are worth a rush, but because, on a subject so important, truth is entitled to every man’s defense; because this faith is shared, in our time, by the most respectable citizens of all classes; and because it is delivered to us from a past generation, strongly stamped with the approbation of the best men that have lived in all the ages.

A President of the United States may legally be elected and re-elected for an indefinite number of terms; there is nothing in the Constitution to forbid it; but the two-term precedent set by Washing-

ton, followed by his successors, consecrated by time and approved by all the public men of the country, ripened into a rule as efficient in its operation as if it had been a part of the organic law. A distinguished and very able Senator of the Grant party, who had carefully inquired into the state of popular feeling, told me in 1875 that the sentiment which opposed a third term was stronger than a constitutional interdict; the people would more readily assent to a breach of positive law textually inserted into the Constitution than to any disturbance of an unwritten rule which they regarded as so sacred.

Certainly it was adhered to by all parties, with a fidelity which some of them did not show to the Constitution itself, down to 1875, when the first attempt was made to contravene it by putting up General Grant for a third election. This was everywhere received by the rank and file with mutterings of mutiny, and the most devoted partisans responded with curses, which if not loud were deep. The movement, as Mr. Howe tells us, was met by solemn warnings from the newspaper press, by strong protests from political conventions, and finally by the resolution quoted at the head of this article, which was a rebuke so overwhelming that the supporters of the third-term candidate fled from him in fear, deserted him utterly, and left him without a single vote in the nominating convention of his own party.

Mr. Howe has no doubt that this resolution was the sole cause of Grant's defeat in 1876. He is equally certain that it was all wrong. He gives the Republicans who supported it no credit for sincere belief in the principle they professed. He says they were not "brave and conscientious" enough to "stake the post-offices" on Grant's election; he charges that they were moved only by a base and dishonorable dread of losing the spoils when they abandoned their chief in the midst of his struggle. It is not for me to say whether this imputation of cowardice and dishonesty is or is not a slander on the Republicans, but I think I know a good many of the gentlemen accused who are at least as brave and conscientious as Mr. Howe himself. It is doubtful if even the contractors and office-holders under General Grant were quite so godless a crew as Mr. Howe represents them to be.

However that may be, the present intent of Mr. Howe is to rally the routed third-termers, and restore the courage of the recreants by the assurance that the jobs and offices are safe, after all. To that end he tells them that their panic was caused by a "spook," they were frightened by a "strange fulmination," they were "scared by a senseless clamor," and by "reiterated vociferations," and the Springer resolution, he says, was "a champion piece of charlatanry enacted in the House of Representatives." This is loud calling to the fugitives, and perhaps it may bring some of them back. But it proves nothing against the Springer resolution, and to destroy the effect of *it* is the



task which Mr. Howe has set himself. His ultimate design is to elect General Grant, and no true lover of American liberty can vote for Grant with a safe conscience, if he believes that a departure from the Washington precedent is "fraught with peril to our free institutions." For this sufficient reason, and with this end in view, Mr. Howe goes seriously about the work of blackening the character of the Springer resolution and bringing it into public infamy, contempt, and hatred.

He makes *four* specific and distinct charges against the resolution, and avows that the aim and intent of his article is to make these charges good. He "thunders in the index" and opens upon the resolution with these appalling threats :

It is, therefore, the purpose of this article to show that in those few lines quoted from the Journal of the House of Representatives are comprised—(1) a grave impeachment of the Federal Constitution ; (2) a gross libel upon its framers ; (3) a base counterfeit of our political history ; and (4) a wanton insult to our common sense.\*

These are grave accusations. If the resolution is guilty of all this, it ought to be not only expunged, but cut out of the record and burned by the common hangman. It is worth while, therefore, to see whether Mr. Howe's arguments and proofs do accomplish the declared purpose of his article :

I. I am not sure that I know what he means by *impeachment of the Constitution*. He certainly does *not* mean the *violation* of it. The wildest orator on a Western stump would not say that we are *commanded* by the Constitution to elect the same person three times. Mr. Howe himself goes no further than to say that the Constitution "clearly permits it." He has some misty and confused idea in his head that we dishonor the Constitution, or fly in the face of it, if we fail to do whatever it does not forbid. "The fundamental law," he says, "puts no limit to the number of terms for which the people may elect the same man to the presidency," and from this proposition he jumps to the conclusion that the Constitution is impeached (whatever that may mean) when the representatives of the people affirm the danger and impropriety of giving more than two terms to the same person. A gentleman who has occupied the seat of a Senator in Congress ought to know that the Constitution "clearly permits" many things which, nevertheless, ought not to be done. Without encountering any prohibition, we might make the criminal code as bloody as that of Draco ; or keep a standing army of half a million of men in time of peace ; or starve labor by taxation to stuff capital with bounties. But is it any impeachment of the Constitution to say that such measures would be "unwise, unpatriotic, and fraught with peril to our free institutions" ?

\* The parenthetic numerals are mine.—B.

Mr. Howe alleges loudly, learnedly, and with great solemnity, that General Grant was eligible in 1876, and is now eligible—that is to say, capable of being elected notwithstanding his two previous elections. To show this he has spread himself over many pages of dreary and commonplace writing. His success is perfect, if success it can be called to prove what no human being in the world ever thought of denying; but from this conceded truth, so elaborately set forth, he draws the absurd inference that we can not refuse to elect him without an *impeachment* of the Constitution. This kind of logic, if we adopt it, will lead to curious consequences. If one citizen *must* be elected because he is eligible, what are we to do with the millions of others who are equally eligible? We can not elect every male native over thirty-five years of age; but, if we do not make them all Presidents at once, we impeach the Constitution, which provides that any one of them may be chosen. The Constitution “clearly permits” us to elect a third-term candidate or a new man; but, if permission implies obligation, we violate duty by rejecting one as much as the other. The fifteenth amendment makes an African eligible; therefore we impeach the amendment every time we elect a white man, and we impeach the original instrument if we choose a negro; “either way we’re sped.”

The logic of Mr. Howe will apply to State officers and to subordinate officers of the United States with as much force as to the President. Mr. Robinson was Governor of New York, a candidate for reelection, and clearly eligible; his defeat was, in the opinion of many good men, most improper, unwise, and unpatriotic, but neither his friends nor his enemies thought the Constitution impeached by the election of his competitor. Mr. Howe was a Senator, and when his term expired he was anxious above all things to be re-elected, but for some reason, of which I know nothing, he was rather badly beaten. He himself may have believed that the Legislature of Wisconsin impeached the Constitution when it chose Mr. Carpenter in his place, but it is very certain that nobody else did.

The friends of a third term may complain that I am taking an unfair advantage of Mr. Howe’s loose language. Perhaps his meaning may be more precisely expressed thus: The Constitution permits the same man to be elected three times or oftener; the Springer resolution declares it unwise, unpatriotic, and dangerous to elect any one more than twice; and this is an impeachment of the Constitution, because, in effect, it affirms that the Constitution “sanctions an act malevolent in its tendencies.” But, after all the help we can give him in stating and restating his view, it remains as preposterous as ever. The Constitution leaves to the people an unlimited discretion in the choice of their Chief Magistrate. To any man’s pretensions they have a legal right to say *no* as well as *yes*. They and their representatives



may certainly deliberate and determine how that discretion shall be exercised, and to put their decision into the form of a general rule or political principle which will exclude classes of men from their favor as well as particular individuals. Thus we might resolve against the propriety of electing a drunkard or a gambler, though there is nothing in the Constitution which makes a sot or a blackleg ineligible. The Constitution "clearly permits" one who is or has been an officer of the army to be made President; but, when General Jackson was a candidate, all the anti-Democrats of that day resolved and re-resolved that the election of a military chieftain would be not only unwise, unpatriotic, and dangerous, but a calamity to the country worse than war, pestilence, and famine combined. This was false, no doubt, but it was not suspected then or since of being an impeachment of the Constitution. All, or nearly all, citizens of the South who fought for their "lost cause" are eligible to the presidency, but Mr. Howe would concur without hesitation in a resolution declaring the election of a Confederate brigadier "unwise, unpatriotic, and fraught with peril to our free institutions," and it would never strike him that he was thereby impeaching the Constitution "which sanctions an act so malevolent in its tendencies."

This allegation that the Constitution has been impeached is so weak and so shallow that it would not deserve refutation if it were not the main objection of the leading *third-termers* to a wise and salutary rule, established by the fathers of the republic, and concurred in by all parties of the present day; for this two-term rule is not only recommended by its intrinsic soundness, it is orthodox according to St. Augustine's definition of orthodoxy: "*Quod ubique, quod semper, quod ab omnibus creditum est.*" That which is believed to be right everywhere, always, and by all persons, must be defended by the faithful even against the puniest assaults of interested and ill-natured schismatics.

II. It is asserted, in the second place, that the resolution of Congress is a *gross libel* upon the *framers* of the Constitution; that is to say, it slanders the character of the men who made the Constitution, and maliciously injures or attempts to injure their good repute.

Who are the "framers" wronged by this "gross libel"? General Washington, "the foremost man of all this world," presided at their deliberations, and, next after Washington, the most conspicuous member of the body was Madison, who took so large a part in framing the Constitution that he has ever since been called the father of it. These two illustrious men afterward became President under the Constitution which was the work of their hands. Although they were not required to lay down their charge at any specified period of their service, yet both of them did voluntarily retire after serving two terms. During all their subsequent lives they were followed by the approving



benedictions of their countrymen; and their graves are hallowed ground. They rested from their labors, and their righteous works did follow them, time-honored, through later generations.

When the Romans desired to honor a deceased benefactor, they went up to the Capitol and publicly crowned his statue with laurels; the Representatives of the American people, in December, 1875, did for Washington and Madison what was more than equivalent—they solemnly and with one voice commended their example as worthy of all imitation. This commendation, expressed in language implying love and admiration as perfect as could be on this side of idolatry, is what Mr. Howe calls a *gross libel* on them and all the framers of the Constitution! Can the absurdity of mortal man go further?

III. Besides this, the resolution, according to Mr. Howe, is a *base counterfeit of our political history*. Here he takes me entirely out of my depth. I can not form the remotest conjecture of what he would be at. I have fairly tried to comprehend him, but I give it up. Congress expressed its belief in a certain political principle or rule of action, and Mr. Howe calls the expression a counterfeit of history! When an ex-Senator undertakes to be a public teacher, his utterances ought to have some kind of meaning in them; but this appears to be mere “sound and fury signifying nothing.”

IV. He has another objection to the resolution: he says it is an *insult to our common sense*. This is the ordinary style of a disputant who knows he is angry but does not know why; it is the usual explosion of rage without reason; it was Mrs. Moriarty’s objurgation upon O’Connell when he told her the fish was not sound; it is the commonest kind of scolding, for which there is no answer and no punishment except the ducking-stool.

It was the express purpose of Mr. Howe’s article to show these four allegations against the Springer resolution to be good and true. He has ignominiously failed at all points, and therefore the article itself is such a manifest abortion that it might be allowed to pass without further notice. But he has other arguments for a third term. They are not true or powerful or even plausible, but they are curious enough to invite attention and, perhaps, to reward examination.

From the conceded fact that the Constitution does not forbid re-election, he reasons that in practice re-elections should go on without limit; and he thinks he strengthens this argument if he shows that re-eligibility was a part of the plan very much favored by the men who framed and adopted it. Therefore he says: “No one idea was so prominent or so universal in the Constitutional Convention as this: *Presidents must be re-eligible*.” He emphasizes this in screaming italics, and follows it immediately by citing at great length certain proceedings of the Convention—votes, speeches, reports, and propositions—which, instead of supporting, flatly contradict the assertion



with which he started out. They prove incontestably that in fact and truth there was no one idea about which there was so much difference, doubt, hesitation, and change of mind. The idea, supported for a long time, and with great firmness, by a large majority, was exactly the reverse. That Presidents must *not* be re-eligible—never at all—but confined strictly to one single term, was a proposal not only made and debated, but adopted and carried time and again, though earnestly opposed by Gouverneur Morris, Roger Sherman, and Rufus King. It was not until the close of the Convention, the last day but one before its final adjournment, that the present plan of choosing the President by electors coupled with re-eligibility was agreed to. And all this is made manifest by Mr. Howe's own citations from the debates and journals. Other partisans before now may have been as reckless in assertion as he; but I am not aware that any one has so incontinently refuted himself.

He says: "The records of that great debate do not preserve the name of a single man of judgment so debauched as to object to the re-eligibility of Presidents, if only the choice could be preserved from legislative control." Here he measures his words with a caution he does not often use. He wishes it to be understood that the *only* opposition to re-eligibility was grounded on the mode of election by the Legislature, and to make this impression he declares that no other objection was urged *in the debate* which took place while legislative election was a part of the plan. This can be contradicted only at the expense of examining all the speeches. But it is not worth a contradiction; for the allegation, even if true literally, is substantially false. That was not the only nor even the principal objection. There was a general desire to limit the time during which the office might be held by the same person, irrespective of the mode in which he should be elected. Nobody—certainly no undebauched man of that day—professed a wish to see the executive power in one hand continually. They were founding a free republic, to last not for a day, but for all time, and they knew very well that a republic with executive power and patronage perpetually wielded by the same person would soon cease to be a republic either in form or in substance. That this was the general if not universal sentiment, is shown by the specific declarations to that effect of the most eminent and best informed among them, and by the practical action of all in the formation of their State governments, which uniformly provided for short limitations upon the tenure of their principal magistrates. Besides all this, here is another fact which Mr. Howe ought to have known, but probably did not—namely, that the objection to re-eligibility was kept up *after* the present mode of election had been agreed to and settled: New York proposed that the President should not be eligible a third time; Virginia and North Carolina expressed their wish that he should be



made incapable of serving more than eight years in any term of sixteen.

Mr. Howe's allegation on this point is true so far, and so far only, that the opponents of re-eligibility ceased their determined struggle against it when the present plan of electing the President became a fixed part of the Constitution. Their fears were in a great measure quieted when the power to control the choice was taken away from the Legislature and put into the hands of electors appointed by the States; for that was virtually leaving it to the people, and the people, under the great chief who had led them through the perils of the Revolution, and surrendered his commission at the close of it, could be trusted to act rightly without being bound up by express legal obligation. Washington, first in the hearts of his countrymen, would certainly be first in the administration of the new Government, and sure to set an example which none of his successors would ever depart from. The event justified their faith. Washington was the first President. He was elected and re-elected unanimously. No name could stand for a moment before the competition of his. But at the end of his second term he retired to private life. This gave the crowning glory to his character, called forth the plaudits of the civilized world, and all men with joint acclamation agreed that nothing in his great public career became him better than the ending of it. Those who succeeded him did likewise, and strengthened the authority of his example by repeating it. So it came to pass that no President who reached a second term, from the organization of the Government to the centennial year of Independence, asked for a third term, or suffered himself to be named as a candidate again.

But in Mr. Howe's estimation all these examples go for nothing. Nay, they are accounted worse than nothing; in his opinion they are pernicious and fit only to be the cause of senseless clamor and popular panic. His manner of depreciating the value of the precedents and belittling the characters of the men who set them is worth looking at.

He argues that Washington's conduct in retiring ought not to be imitated, because his reasons were "not patriotic," but personal. Washington had an intense desire for the rural tranquillity of Mount Vernon, and Mr. Howe cites against him his passionate declaration, that he "would rather be on his farm than be made emperor of the world." A man of such sentiments, Mr. Howe thinks, ought not to influence the behavior of another who has no taste for agriculture; and he professes his total inability to see why the refusal of a third term by Washington, who did not want it, should be quoted nearly a century later against Grant, who does want it very much. Washington longed to lay aside the trappings of power, "which galled him while they glittered"; but why should that balk the ambition of Grant, who would gladly wear them for life?



Popular veneration for the men who built up our institutions is the strongest support for the institutions themselves. It is not only a great good intrinsically, but also the motive principle to other virtues which are indispensable in a government like ours. Anything, therefore, which unjustly detracts from their reputation is a grievous public injury. This applies most especially to Washington, who is acknowledged, not only by us, but by every nation, tongue, and kindred under heaven, to have been incomparably the greatest man that any country ever produced. An indecent criticism upon him shocks and shames us like blasphemy. Nevertheless, we would not abridge the liberty of speech. A raging third-termier has as good a right to sneer at the Father of his Country as an independent Hottentot has to beat his mother. But Mr. Howe's censure of the Washington precedent is based upon a false morality. It supposes that the virtuous act of a public man is not to be imitated if the doer took pleasure in it; it may be treated with total contempt by any successor whose personal inclinations are averse to it. This leaves no distinction between right and wrong, except what is made by the passions and interests of each individual. Cincinnatus assumed the dictatorship of Rome at the urgent call of his country, drove away the Gauls and relieved the city from its imminent danger as rapidly as possible; then, laying aside the lictors and the fasces, and the curule-car, and the purple robe, he hastened immediately home to his plowing, which he had reluctantly left unfinished. By the influence of this example the Romans were saved from slavery a score of times, and their liberties were finally lost by disregarding it; but, according to Mr. Howe's notion, it was not binding on any subsequent dictator, unless he was, like Cincinnatus, particularly fond of plowing. Very probably the sycophants of Marius and Sylla and Cæsar presented to them exactly this view of the subject. General Grant may accept it at the suggestion of Mr. Howe, but the American people will hardly believe that a point has been made against Washington strong enough to do the cause of third term much good.

Mr. Howe appears to be under the erroneous impression that Mr. Adams the elder was twice elected; but, inasmuch as nobody asked him to be a candidate for a third term, his example "furnishes no more sanction to the Springer resolution than does the example of Mr. Washington." Mr. Howe's habitual want of precision may sometimes make him seem to be ignorant when he is not; but, if he had known that Mr. Adams was defeated when a candidate for a *second* term, and, therefore, could not possibly be cited as an example for or against a *third* term, he would certainly have spared us the irrelevant and pointless assertion that the examples of Adams and Washington are *alike* worthless as a sanction to the doctrine which favors retirement *after* a second term.



Jefferson also comes under review. His precedent, whether good or evil, is at least "to the purpose." In letters addressed to the Legislatures of Vermont, New Jersey, and Pennsylvania, dated on the 10th of December, 1807, and printed in the "Aurora" at Philadelphia on the 19th of the same month, he solemnly and publicly announced to the country that he would not disregard the precedent of his illustrious predecessor by accepting another election. His reasons are brief, simple, and clear, like all the productions of that master-hand, and expressed in language so transparently truthful and dignified that no man of rightly constituted mind can read the paper without being stirred by the strongest emotions of respect and admiration for its author. It compresses into a few sentences all that needs to be said in favor of the two-term limitation, and is at the same time a perfect answer to all objections. Mr. Howe is fair enough to take a passage from it and incorporate it with his article ; it shines there like a piece of solid gold set in a shapeless mass of lead. Confined as I am in time and space, and unnecessary as it may seem, I can not resist the temptation to adorn my own page by quoting entire the letter of which Mr. Howe has given a part. In these times, when the subject is up for renewed consideration, this letter should be read again and again; every citizen ought to have it by heart and teach it to his children, write it on the lintels of his door, bind it as a frontlet between his eyes, and make it the subject of his meditation day and night :

*December 10, 1807.*

*To the Legislature of Vermont.*

I received in due season the address of the Legislature of Vermont, bearing date the 5th of November, 1806, in which, with their approbation of the general course of my Administration, they were so good as to express their desire that I would consent to be proposed again to the public voice on the expiration of my present term of office. Entertaining as I do for the Legislature of Vermont those sentiments of high respect which would have prompted an immediate answer, I was certain, nevertheless, they would approve a delay which had for its object to avoid a premature agitation of the public mind on a subject so interesting as the election of a Chief Magistrate.

That I should lay down my charge at a proper period is as much a duty as to have borne it faithfully. If some termination to the services of the Chief Magistrate be not fixed by the Constitution, or supplied by practice, his office, nominally for years, will in fact become for life ; and history shows how easily that degenerates into an inheritance. Believing that a representative government responsible at short periods of election is that which produces the greatest sum of happiness to mankind, I feel it a duty to do no act which shall essentially impair that principle ; and I should unwillingly be the person who, disregarding the sound precedent set by an illustrious predecessor, should furnish the first example of prolongation beyond the second term of office.



Truth also requires me to add that I am sensible of that decline which advancing years bring on, and, feeling their physical, I ought not to doubt their mental effect. Happy if I am the first to perceive and to obey this admonition of nature, and to solicit a retreat from cares too great for the wearied faculties of age.

For the approbation which the Legislature of Vermont has been pleased to express of the principles and measures pursued in the management of their affairs, I am sincerely thankful; and should I be so fortunate as to carry into retirement the equal approbation and goodwill of my fellow citizens generally, it will be the comfort of my future days, and will close a service of forty years with the only reward it ever wished.

Two days after the publication of the foregoing letter, to wit, on the 21st of December, 1807, he wrote to the Appomattox Association (Baptist) thus:

Believing that a definite period of retiring from this station will tend materially to secure our elective form of government, and sensible, too, of that decline which advancing years bring on, I have felt it a duty to withdraw at the close of my present term of office; and to strengthen by practice a principle which I deem salutary. That others may be found whose talents and integrity render them proper deposits of the public liberty and interests, and who have made themselves known by their eminent services, we can all affirm of our personal knowledge.

February 3, 1808, he told the citizens of Philadelphia, in town-meeting assembled: "Your approbation of the motives for my retirement from the station so long confided to me is confirmation of their correctness. In no office can rotation be more expedient; and none less admits the indulgence of age."

On the 16th of the same month he said to the citizens of Wilmington, Delaware: "It is a consolation to know that the motives for my retirement are approved; and, although I withdraw from public functions, I shall continue an anxious spectator of passing events, and offer to heaven my constant prayers for the preservation of our republic, and especially of those its best principles which secure to all its citizens a perfect equality of rights."

Similar expressions are scattered all through his correspondence as long as he remained in office, and after he retired to Monticello he continued to repeat them. His conviction deepened, as the years rolled on, that the principle of two terms was the only safe one, and he constantly expressed his gratitude for the universal approval of his conduct in adopting it.

How is this met by the late Senator from Wisconsin? Mr. Jefferson's reasons for retiring are opposed by objections none of which rises to the dignity of a quibble. The best specimen of hypercriticism that can be selected from among them is embodied in the charge that Mr.

Jefferson's declination deprived the people of the right to choose whom they would for President. The very words of the article are these : "The people had not free choice, but restricted choice, and their freedom was impaired by the act of Mr. Jefferson." If this oracular judgment be correct, we must take it hereafter as settled law that whosoever declines being a candidate for the presidency commits a crime against the freedom of elections.

Nevertheless, Mr. Howe is constrained to acknowledge that Mr. Jefferson's "reasons are satisfactory." Still, he is not satisfied. Having demolished General Washington, he does not think it well to let Mr. Jefferson stand. Therefore he sets about the serious work of making Jefferson altogether infamous. He avers (in his own loose way, of course, but still intelligibly enough) that Mr. Jefferson was an impostor, utterly faithless and insincere through all this business ; that, so far from wishing to retire, according to the precedent he professed to believe in, he was actually a busy candidate for a third term ; that he engaged for thirteen months in an active canvass to get himself elected ; that there was a Jefferson boom in which Virginia, his own State, obstinately refused to join ; that he gave up the chase only when he found himself beaten by Madison, and then he falsely pretended that he did not want a third term ; that his tardy declination was merely an attempt to frame his disappointment into a law which should prevent any of his successors from serving longer than he did. From these premises, if they were true, the conclusion would be natural and just that a precedent made or a practice established by Jefferson deserves only the disdain of honest people.

But every well-informed man in the country, except Mr. Howe, knows this whole accusation to be false in every point and circumstance. Mr. Jefferson never sought a third election, or engaged in any canvass with that object, or expressed by act or word any desire to be chosen again. On the contrary, Mr. Madison, then his Secretary of State, and always his devoted friend, was a candidate with his fullest approbation, and received from him all the support which he could becomingly give. The charge now made, that he was unfaithful to his friend, his country, and his own expressed convictions of public duty, is unsupported by a single spark of evidence. Mr. Howe's belief in it pretends to rest on nothing except the naked and solitary fact that Mr. Jefferson published his declination, and gave the reasons for it, only a year before the election at which his successor was to be chosen, although one of the addresses on the subject (that from the Legislature of Vermont) was dated a year previous. This has not the slightest tendency to prove it, or even to suggest a suspicion of it, in the mind of any fair man who considers how many and how proper might be the reasons for delicate silence about everything concerning the presidential election of 1808 until the State elections



of 1807 were overpassed. But the charge becomes a scandal and a shame when we look at Mr. Jefferson's own explanation of his delay, as given in that part of the Vermont letter which Mr. Howe has not published. It is worse still—it is an outrage upon truth—when it is seen to be inconsistent with every material fact which the history of the time discloses.

This is a fresh calumny upon Jefferson—the latest of many thousands. I do not impugn the personal veracity of Mr. Howe when I say that his party, at all times and under all of its many names, has taken a fierce delight in defaming the great Apostle of Democracy. It has not forgiven, and it will never forgive him, for maintaining the rights of the States and the liberties of the people, while he preserved the powers of the General Government in their whole constitutional vigor. It seems a useless labor to vindicate him; for the enemies of the free system which he did so much to sustain are continually reviving old slanders or fabricating new ones. The spider, whose web is broken by the broom, invariably reconstructs it or spins another from his bowels:

“Destroy his fib or sophistry—in vain;  
The creature's at its dirty work again.”

But Madison also adopted the principle of his two predecessors, and retired at the end of his second term. Can nothing be urged against the Father of the Constitution to depreciate his authority or make his example worthless? Was not he also unpatriotic and selfishly fond of his farm? This could be easily said, and is not harder to believe of him than of Washington. The charge might also be made that he was an actual candidate for a third term, declining only upon the failure of a Madison boom; and history would not contradict it more emphatically than it contradicts the story of Jefferson's boom. But not a word have the third-termers to say about him in the way of detraction, except that he is libeled by the praise of Congress. Except for that, we are graciously permitted to take his precedent and follow it with respect undiminished.

And there was Monroe, apparently “so clear in his great office” that rivalry itself shrunk from his presence, and he was elected a second time without effort, without opposition, without one vote against him. Is it nothing to the purpose that he acknowledged the value of the Washington precedent? Concede that he, the most popular of all Presidents, except the first one, could not have got a third term if he had asked for it, then his retirement proves not only that the two-term practice was right in his individual opinion, but that the general judgment of the nation was in its favor. It is true, in point of fact, that at that time, and for long before, the precedent set by Washington “had become by universal consent a part of our republican system

of government," and the whole people, much as they loved Mr. Monroe, would have frowned him out of countenance if he had attempted to resist it. Still, it is odd that the abuse by the Federalists of Mr. Monroe, or even the vituperation of Burr, should not have been fished up and reproduced to show that his example is as worthless as that of the other Presidents. Perhaps Mr. Howe, as a matter of literary taste, thinks it proper to deal only in *original* slanders.

General Jackson does not get off so easily. We are told that "there is ground for believing that if Mr. Van Buren had not secured the succession to General Jackson the latter would have been retained for another term." This is like the account we have of Jefferson's boom. If there was any practice of Jackson's great predecessors in which he acquiesced with more deference than another, it was their voluntary retirement after a proper period of service. He was wholly opposed to the indefinite continuance of power in the same hand, and he expressed his opinions on that, as on other subjects, with an emphasis which left no chance for misapprehension. The ground for believing that "in a certain contingency he would have been retained another term" is not anything he ever did or forbore to do—nothing that he ever wrote or spoke—nothing that ever was authorized by him or by the party which supported him, or by any representative of either. Mr. Howe has found somewhere an old newspaper, of date not given, but called the "Herald," and printed at Philadelphia, no one knows by whom, which was so obscure while it lasted, and ceased to exist so long ago, that nobody living recollects anything about it—and this paper (a Democratic paper, if Mr. Howe is correct) said, at some time or another, on its own responsible motion, and by way of prediction, that, if there should be serious division in the Democratic ranks, the National Convention would nominate Jackson for a third term. This prediction, which it is not pretended that Jackson ever saw or heard of, is "the ground for believing" that Jackson would have been retained, and constitutes the head and front of that great man's offending against the Washington precedent which he believed in so devoutly and acted upon so faithfully. It is impossible to take such idle trash into serious consideration. We let it go for what it will fetch, assuring Mr. Howe that, though patience is not our special virtue, we are able, by the grace of God, to endure this harmless kind of nonsense about General Jackson without losing our temper.

Such is the outcome of Mr. Howe's assault upon the line of our great retiring Presidents, from Washington to Jackson inclusive. It must be admitted that, if the predetermined object of the attack was to make himself ridiculous, it is a marked success; but if it was an effort in real earnest to diminish their fame, lower their standing, or shake the confidence of the country in their virtue, then it is the flattest failure in his essay—and that is saying a great deal.



It is not simply the unworthiness of those Presidents who have adopted the two-term practice which makes it so odious in the eyes of Mr. Howe; their authority, he thinks, is overruled by the different and inconsistent practice of others. He says that "a majority of our Presidents have retired after a first term," and then puts the very pertinent question, "Why should the two-term precedent become a part of our governmental system more than the one-term system?" The answer is, that Mr. Howe is mistaken about the fact. A majority did *not* retire after a first-term. Previous to the time of General Grant, fourteen citizens had been elected to the office of President. *Five* of them—Washington, Jefferson, Madison, Monroe, and Jackson—were elected twice and retired after their second term. *Two*—Harrison and Taylor—were elected once and died in office. *One*—Lincoln—was elected twice and died during his second term. *Four*—John Adams, J. Q. Adams, Van Buren, and Pierce—were elected only once. They did not retire after their term expired, but were candidates for a second term. *Only two* of all the fourteen—Polk and Buchanan—retired upon one term without asking a re-election. It is exclusively the last two named that can be quoted as examples of retirement after a first term. Where, if not in Louisiana, did Mr. Howe learn that two were a majority of fourteen?

But, suppose it to be true that a majority of our Presidents had voluntarily and actually retired after their first term, setting aside the two-term precedent, and substituting in its place the one-term principle "as a part of our governmental system," how would that help Mr. Howe's argument? He is opposed to the two-term rule, and wants to prove that three terms are better; thereupon he asserts that the highest authority is in favor of only *one*. He does not see that this is a logical contradiction of himself and cuts up his case by the roots.

In the article we are reviewing, the author, after denouncing the Washington rule, tries to evade its operation upon his candidate by saying: "It only enjoins retirement after a second term. Grant retired at the end of the second term in strict accord with the precedents and the resolution." This is a dodge, and not a very artful one either. Grant never retired. He was, according to Mr. Howe's own testimony, a candidate in 1876, defeated by the influence of the Springer resolution and the cowardice of his party friends; he has been a candidate ever since, and is a candidate now. Call you that retirement "in strict accord with the precedents and the resolution"? He was compelled to forego his claim to a third term when his second expired; but he stood back for the time, only to thrust himself forward again at the first opportunity. How does that accord with the precedents? An obligation is not measured merely by its literal terms; it must be met in good faith according to its sense, spirit, and equity. It is held under every code of morals and of law, in

all civilized countries, that a performance which keeps the word of promise to the ear and breaks it to the hope is no performance at all. For instance, an agreement to discontinue a pending action is not complied with by formally dismissing the suit and then immediately bringing another; a contract to deliver a certain quantity of cloth in pieces is broken if it be cut into pieces so small as to make them useless; a covenant to retire from the possession of land is not fulfilled when the occupant goes out to-day and comes back to-morrow. This principle of private and public morality, which detests shams, might be supported by innumerable cases if it were not too plain to need illustration. It will certainly be acknowledged by every candid man that, if General Grant, after two elections, kept himself in the field as a persistent candidate for a third term, the pretense that he retired agreeably to the precedents is untrue and fraudulent. But the imposture is not chargeable upon him. He does not pretend to have retired. He is a candidate for another term in contempt of the precedents. He does not evade, but boldly defies the authority of his predecessors. He has, and is entitled to, some credit for obtuseness of moral perception, but still he is conscious that equivocation is as bad as direct falsehood; and we have no right to suppose that he ever adopted the Know-nothing philosophy, which teaches its disciples to—

“Palter with us in a double sense,  
And lie like truth.”

Thus far I have been answering objections to the two-term rule, and to the character of the men who made it. I think it may be affirmed with some confidence that Washington was not unworthy of the profound veneration in which he is held in this country and throughout the world; that succeeding Presidents, when they followed his footsteps, not only acknowledged his wisdom and patriotism, but showed their own; that the American people of our day, when they refused a third term to a candidate who had already served for two, were not behaving like cowards scared by a senseless clamor, but doing what a prudent regard for their true interests required; that when the House of Representatives, in obedience to the universal sentiment of its constituents, unanimously and without distinction of party, put upon its records and published to the world its solemn declaration that the example of Washington must be adhered to in the future as in the past, they did not enact *charlatanism* or repeat a *vociferation*, or issue a *strange fulmination*, or *impeach* the Constitution, or *libel* its framers, or *counterfeit* history, or *insult* common sense, but spoke what they at least believed to be the words of truth and soberness.

But perhaps it is not enough to have negatived Mr. Howe's allega-



tions. We are not to set up political dogmas or invoke a blind faith even in the founders of the republic. The mere authority of names, however great, ought not to command our assent. We should have reasons for our belief, and be instant in season and out of season to give them when asked for. But a fundamental doctrine, self-evidently true, though easy to defend, is the hardest of all things to support by affirmative argument. We can not help but sympathize with the indignation of Pitt when he thundered out his refusal to look at books or listen to logic in defense of English liberty. In a free country, the man who would be faithful to his fellows is necessarily inclined to take as a postulate whatever manifestly tends to the preservation of the public right.

In the matter before us, it should be plain to every "reasonable creature *in esse*" that long continuance of supreme executive power in one hand is not only perilous to free institutions, but perfectly certain to destroy them. Some fixed time there ought to be when the people will not only have the right, but exercise it, to displace their Chief Magistrate and take another. If they do not possess this right, they are political bond-servants by law; if, holding it, they forego the use of it, they make themselves, *quoad hoc*, voluntary slaves, and they soon come to be governed in all things by the will of their superior. A lease for years, renewable and always renewed, gives the tenant an estate without end, and makes him lord of the fee.

Where the Chief Magistrate is vested, as ours is, with great power liable to gross abuse, if there is no law or practice which forbids him to be re-elected, he can remain in office for life as easily as for a term. He has the appointment of all officers, the making of all public contracts, and a veto upon all legislation, besides the command of the army and navy. By an unscrupulous use of these means he can coerce not only his horde of immediate dependents, but he can control the corporations and become the master of all the rings, put the business of all classes under his feet, corrupt the venal, frighten the timid, and check all ambitions but his own. He can force the elections of every State he desires to carry by the bayonets of his army. If that fails, he can order a false return, and pay for it out of the public treasury. The people would soon perceive opposition to be useless and accept the situation; elections would be as mere a matter of form as they were in Rome when such consuls as Nero and Domitian were elected regularly every year under the supervision of the pretorian guards.

If these were no more than remote possibilities, prudence should guard us against them. But they are near probabilities; the signs of the times warn us that the peril to our institutions is imminent; the danger is already on the wing. It is vain to remind us that the President swears to preserve, protect, and defend the Constitution



and see the laws faithfully executed. That is true ; and it is also true that, if there be no perjury in the case, the Constitution, laws, and liberties of the country are safe. But the last twenty years have given us ample proof that an oath is not much restraint upon a President who is incited by ambition, rapacity, or strong party feeling, to break it.

It is true that this presupposes a people much degenerated, and a magistrate animated mainly by the vulgar love of power for its own sake ; but exactly such a conjunction of things has always been feared with good reason, and hence comes the desire to put every check on that tendency to "strong government" which is now manifesting itself in many quarters.

What is the remedy ? How shall we avert the dire calamities with which we are threatened ? The answer comes from the graves of our fathers : By the frequent election of new men. Other help or hope for the salvation of free government there is none under heaven.

If history does not teach this, we have read it all wrong. In the republics of ancient and modern times the chief magistrate was intrusted with only temporary power, and always went out of office at the end of a short period, fixed and prescribed by law or custom. It was this, indeed, which made the substantial distinction between them and the monarchies around them. An unpunished transgression of the customary limitation was uniformly followed by destruction. Everywhere and always it was the fatal symptom of decay—the sure forerunner of ruin. When Cæsar refused to lay down his consulship, as his predecessors had done, at the end of a year, and was re-elected time after time with the acquiescence of the Senate and the people, all that was real in Roman freedom ceased to exist. Two republics in France were brought to an end in the same way. Napoleon began by being Consul for a term, then was elected for life, and finally became Emperor, with the powers of an absolute despot. The last Bonaparte was President for four years, was re-elected for ten, and ended, like his uncle, in grasping the imperial crown.

"May this be washed in Lethe and forgotten" ? Shall these lessons be lost ? Shall the lamp which guided our forefathers be extinguished ? Shall the broad daylight of all human experience be closed up in a little dark lantern manufactured at Milwaukee ? I think this can not be done ; "the eternal verities" are against it. The most powerful third-termers may as well try to blow out the sun, as he would a tallow candle, with the breath of his mouth.

Moreover, the two-term principle ought to be adhered to by us and by those who come after us (if there were no other reason), simply because it was a practice of those who went before us. It is to the traditions of the fathers that we owe our civilization. All that we have which is holy in religion, pure in morals, or perfect in politics,



is so derived and so transmitted. Without that, we could not be a nation in any proper sense of the term, but a mere collection of barbarians, tame or savage according to circumstances. The practice of one generation is and ought to be law for another. In England every custom favoring civil liberty, once adopted by general consent, became binding upon prince and people. These customs make up the body of the common law, and the English Constitution itself is but a collection of them. "Honor thy father and thy mother, that thy days may be long in the land"—this command was addressed to a *people*, and it was length of *national* life that God promised as the reward of obedience. The later prophets spake as they were moved when they warned that same people that their institutions would perish if they were given unto change, and exhorted them to be conservative—to "look at the old paths and stand upon the ancient ways."

I do not expect anything I can say to be received as a vindication of the two-term rule. Nor is it necessary. All the support it requires was long ago furnished by another, the latchet of whose shoes I am not worthy to stoop down and unloose. Jefferson, the stainless citizen, the sterling patriot, the unequaled statesman—at once the greatest apostle and the truest prophet that human freedom ever had—gave his judgment not only at the time he acted upon the rule, but expressed his convictions after they were strengthened by many years of later reflection. His brief autobiography, written in the retirement of Monticello, contains the following passage :

This Convention met in Philadelphia on the 25th of May, 1787. It sat with closed doors, and kept all its proceedings secret until its dissolution on the 17th of September, when the results of its labors were published all together. I received a copy early in November, and read and contemplated its provisions with great satisfaction. As not a member of the Convention, however, nor probably a single citizen of the Union had approved it in all its parts, so I, too, found articles which I thought objectionable. The absence of express declarations insuring freedom of religion, freedom of the press, freedom of the person under the uninterrupted protection of the *habeas corpus*, and trial by jury in civil as well as in criminal cases, excited my jealousy, and the re-eligibility of the President for life I quite disapproved. I expressed freely in letters to my friends, and most particularly to Mr. Madison and General Washington, my approbations and objections. How the good should be secured and the ill brought to rights was the difficulty. To refer it back to a new Convention might endanger the loss of the whole. My first idea was, that the nine States first acting should accept it unconditionally, and thus secure what in it was good, and that the last four should accept on the previous condition that certain amendments should be agreed to; but a better course was devised, of accepting the whole and trusting that the good sense and honest intuitions of our citizens would make the alterations which should be deemed necessary. Accordingly, all accepted, six without objection and seven with recommendations of specified amend-



ments. Those respecting the press, religion, and juries, with several others of great value, were accordingly made; but the *habeas corpus* was left to the discretion of Congress, and the amendment against the re-eligibility of the President was not proposed. My fears of that feature were founded on the importance of the office, on the fierce contentions it might excite among ourselves, if continuable for life, and the dangers of interference, either with money or arms, by foreign nations to whom the choice of an American President might become interesting. Examples of this abounded in history; in the case of the Roman Emperors, for instance; of the Popes, while of any significance; of the German Emperors; the Kings of Poland, and the Deys of Barbary. I had observed, too, in the feudal history, and in the recent instance particularly of the Stadtholder of Holland, how easily offices or tenures for life slide into inheritances. My wish, therefore, was that the President should be elected for seven years and be ineligible afterward. This term I thought sufficient to enable him, with the concurrence of the Legislature, to carry through and establish any system of improvement he should propose for the general good. But the practice adopted, I think, is better, allowing his continuance for eight years, with a liability to be dropped at half-way of the term, making that a period of probation. That this continuance should be restrained to seven years was the opinion of the Convention at an earlier stage of its session, when it voted that term by a majority of eight against two, and by a simple majority that he should be ineligible a second time. This opinion was confirmed by the House so late as July 26th, referred to the committee of detail, reported favorably by them, and changed to the present form by final vote, on the last day but one of their session. Of this change three States expressed their disapprobation—New York by recommending an amendment that the President should not be eligible a third time, and Virginia and North Carolina that he should not be capable of serving more than eight in any term of sixteen years; and, though this amendment has not been made in form, yet practice seems to have established it. The example of four Presidents voluntarily retiring at the end of their eighth year, and the progress of public opinion that the principle is salutary, have given it in practice the form of precedent and usage; insomuch that, should a President consent to be a candidate for a third election, I trust he would be rejected on this demonstration of ambitious views.

It is time now that we come to the concrete part of the subject. The practical object of Mr. Howe's article is to make General Grant President for another term. It is not for an abstraction that he denounces the two-term precedent and vilifies the Springer resolution. The rule might stand if Grant could be elected without breaking it down. But Mr. Howe thinks that the superiority of his candidate is so very great that all authorities which oppose him should be disregarded, and he supports this opinion by assertions so extravagant that we only wonder how any man in his sober senses could have made them.

He pictures Grant as "the foremost man of his age"; says "he stands upon the mountain-top," and declares that "the eager world



has set the seal of its primacy" on him. Grant's competitors—Blaine, Conkling, Bristow, Hayes, and the rest of them—are described as "mere metallic calves," and all his opponents are scared miners, with candles in their caps, "going into subterranean depths to quarry out a President." This imagery is bold and original, though not highly poetic nor very gracefully turned. It is Mr. Howe's way of saying that he will be very wroth if Grant is not made President a third time, in spite of the salutary principle which forbids it. But we are more afraid of General Grant than we are of Mr. Howe; we would infinitely rather be scolded by the one than scourged by the other; and therefore we, the yeomanry of the country, driven to a choice of evils, presume to withstand Mr. Howe, and tell him in his senatorial face that his master shall not be ours if we can help it. When it comes to the tug, General Grant may be too much for the nation, but it shall not be said that we are frightened by this preliminary blast of mere wind.

A third term for Grant does not mean a third term only, but any number of terms that he chooses to demand. The imperial method of carrying all elections by corruption or force, or of declaring them to be carried when they are not, is to be permanently substituted for the system of free, popular choice.

The figure of Grant standing with the seal of primacy on the mountain-top and looking down on the inhabitants of the plain below gives a measure of the elevation which his sycophants flatter him with the hope of attaining. They urge the necessity of a strong government almost in the very words used by the adherents of Cæsar and the two Napoleons. Strong government, in their sense, means weak laws and a strong ruler—in other words, a substantial monarchy, powerful in its scorn of all legal restraints. If Mr. Howe does not know this to be the design, he is not fit to share in the third-term movement, much less to lead it. He should learn the views of his faction with all possible haste. Let him hear the revelations of Senator Sharon, who is not a "metallic calf" nor a scared miner, but a worshiper of the man on the mountain as *eager* as himself. Let him look at the *idea* of a *strong government* as given in the February Atlantic Monthly; let him listen to the diatribes of all his associates, who speak with habitual contempt about the rights of the States, or let him go up to the mountain and ask *His Primacy* what he himself thinks of a President who is tame enough to keep his oath of fidelity to an old Constitution which forbids him to trample upon the rights of the people.

We, the people—I do not speak by authority, but truly as far as I know—we, the people, are not, in every event, and in all possible contingencies, unalterably opposed to a strong government with General Grant for a monarch. If his instatement can be accomplished by the direct application of physical force, without any shams or false pretenses, it may be a comparative good for us. If, instead of swearing



to preserve, protect, and defend the Constitution, he will candidly declare it abolished, and have no perjury in the business, we may accept our fate, and accept it uncomplainingly, lest a worse thing come to us. A rotten republic is an infinitely worse thing.

A free democratic republican system of government, honestly administered by agents of the people's true choice; a government such as ours was intended to be, with the powers of the Federal Government, the rights of the States, and the liberties of the people so harmoniously adjusted that each may check the excesses of the other—such a government, scrupulously administered within its constitutional limits, is, without doubt, the choicest blessing that God in his loving-kindness ever vouchsafed to any people. On the other hand, it is quite as sure that the false administration of a government theoretically free; which acknowledges the rights of the people, and yet continually treads them under foot; which swears to save, and perjurally works to destroy; which receives and promises to execute a most sacred trust, according to terms prescribed with unmistakable clearness, and then dishonestly breaks the engagement—such a government, so conducted, is an unspeakable curse. It is not only an oppression, but a most demoralizing cheat; a base imposture, more degrading to the nation which submits to it than the heaviest yoke that despotic tyranny can fasten on its neck. If, therefore, a constitutional and legal administration of our national affairs be out of the question—if our only choice lies between a perverted republic and a monarchy—then stop this hypocritical pretense of free government, and give us a king. And who shall be our royal master but Grant? That he will serve the turn as well as, if not better than, another, will, I think, be admitted by all who attend to the reasons now presently to be enumerated.

In the first place, a new monarch (that is, one who has no hereditary claims) ought to be an approved good soldier, with skill to enforce obedience; otherwise his sway could not last long over people disposed to be turbulent. All, or nearly all, the founders of royal lines have been military men, from Nimrod downward. It is vain to deny that General Grant's reputation for military talent is well-founded. It is more than doubtful if any officer of our army could have subjugated the South so completely even with all Grant's advantages, or taken so many defeats and still won a complete victory in the end. It is not, however, what he has done, but what he has shown himself capable of doing, that gives him his leading qualification for masterdom now. The fear that goes before him will make actual violence unnecessary. His strength of character will frighten his subjects into submission where a weaker man would be compelled to butcher them for insurrection.

General Grant is a good hater of those who thwart him, which



is natural, and not a serious fault ; but he is not fiercely vindictive, and his career has been marked by no act of savage cruelty. He could not be an Antonine or a Titus, but we can trust him not to be a Nero.

It may be objected that his moral behavior and mental acquirements do not bring him up to the mark which ought to be reached by the permanent ruler of a great, intelligent, and highly civilized nation. But in this respect he is as good as the average of sovereign princes. The present reigning family of England has never had a male member who was his superior. For centuries past the potentates of Continental Europe, with only a few exceptions, have had habits as coarse as his, and he is wholly free from some terrible vices to which many of them were addicted. It seems to me that he will do well enough to "herd with vulgar kings."

The nepotism from which our democratic tastes revolt is virtue in a king. All monarchs are expected to look after their own families first, and all have their minions and favorites whom they fatten, spoil, and corrupt. Who among them has not given his protection to a worse set than Grant ?

The favor which Grant bestows upon corrupt rings is given for a purpose. As a candidate he can not be elected, as President he can not sustain himself, without their support ; but enthrone him and he can afford to defy them. May we not reasonably hope that he will use his power, when it becomes omnipotent, to make these bad combinations cease to plunder the people ?

What we call the greediness of General Grant for the wages of official iniquity would be entirely proper in the supreme ruler of an absolute government. It is not bribery to buy the favor of a king with presents, and a king is not guilty of stealing when he helps himself to public money without legal right.

It looks to us like a terrible outrage for a President to have himself represented at a State election by the bayonets of his standing army, to install Governors that were rejected at the polls, to tumble the chosen Legislature of a free State out of its hall, to procure the fabrication of false returns and force them on the people. But General Grant's lawlessness would be lawful in a country governed by the mere will of a personal sovereign. Where there is no law there can be no transgression.

But while General Grant has some qualities which would make him a tolerable king, and none that would make him an unendurably bad one, he is not at all the kind of person that is needed as President of the United States, on the assumption that our system of government is to be continued. I think it is to be continued. Unlike Mr. O'Connor, I believe that the struggle to get it honestly administered is not hopeless. We are not yet reduced to the necessity of

choosing between a republic wholly corrupt and a monarchy founded in pure force. Therefore, I conclude with Jefferson that, if any man (General Grant particularly) "consent to be a candidate for a third election, I trust he will be rejected on this demonstration of ambitious views."

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#### GENERAL GRANT AND STRONG GOVERNMENT.

I EXPECTED to write for this number of the Review an essay on "Strong Government," to show the calamitous evils it has brought on other countries, and to point out the dangers with which our own is threatened by its stealthy approaches. And herein I would have tried to make plain the principle of State rights, the solemnity of the compact by which those rights were reserved, the dishonesty (not the error) of the interpretation which denies them, and the duty of maintaining them as the sheet-anchor of individual liberty. But Mr. Boutwell turns me aside, or rather puts me back, by a new defense of the third term, which, upon the prudent principle of *obsta principiis*, the friends of free government must settle first of all; for this third-term innovation is to arbitrary power what a rat-hole in a Dutch dike is to the surging waters of the ocean: if not stopped up, it must become a huge crevasse, submerging all the land.

I do not complain of Mr. Boutwell's article. He had a right to interject his antagonism, and he is an opponent not to be ignored. He is (or has been) a high-placed gentleman—Governor of Massachusetts, Representative in Congress, Senator of the United States, and Secretary of the Treasury. Besides, he is a man of authority in his faction, and trusted to do their polemics. When he speaks it is with a voice potential, as double as that of any leader among them; and, on certain points, his expressive silence reveals the designs of his associates as well as his own. Moreover, his article has some fragments of precious truth, which he has dropped along the path of his argument, apparently unconscious of their value. These I propose to gather up for the service of liberty and justice, to which all truth belongs.

He admits that Washington and Jefferson were patriotic and far-sighted men, entitled to a veneration which will "survive the criticism of Judge Howe, and outlive the defense of Judge Black" (p. 372). The whole American Democracy will thank Mr. Boutwell for this unexpected and most liberal concession. The friends of free government in every land and clime throughout the earth will be rejoiced to learn that the Father of this Republic, and his great coadjutor the Apostle of Liberty, are acknowledged to be venerable even by a subverter of



their work, a contemner of their great example, a most obstinate disbeliever in their teachings. I am placed individually under special obligations to Mr. Boutwell by his gracious permission to speak well of Washington and Jefferson without injuring them fatally in his estimation. When he agrees that the fame of those illustrious men may still live, notwithstanding my defense of them against the aspersions of Mr. Howe, he accords me a high privilege, and binds me to him "with cords of perdurable toughness."

Mr. Boutwell gives us to understand (p. 371) that the character of Washington is not to be attacked just now, because "his example is *not the only remaining* bulwark for the protection of our assailed and imperiled liberties. If this be so, then the reputation of Washington will need a more ardent defender" than I. There is some obscurity about this language, but the unavoidable inference from it seems to be that the projectors of a "*strong government*" intend to break down all the other defenses of civil liberty first, and then, when nothing but the example of Washington shall be left for the people to rally upon, his reputation will be assaulted so ferociously that no ardor of defense can save it from destruction. Be it so. "Sufficient unto the day is the evil thereof." I shall be out of the way before that last struggle takes place, but I shall die in the belief that the great name of Washington will continue to be a bulwark of civil liberty, invincible forever. If the worst comes to the worst, and we have no other shield, they who rush upon the thick bosses of that one will but dash themselves to pieces. Evidently Mr. Boutwell does not see the grandeur of Washington's character or the impregnable basis upon which it stands. The moral influence of it on the hearts of all the world, except a few narrow-minded and ignorant enemies of constitutional government, is much greater than he thinks.

But this is a point on which there is not now any dispute between Mr. Boutwell and me. He gives it up that both Washington and Jefferson were wise and patriotic men, for whom there is no lack of veneration. It is not true, however, that my "argument against the election of any person to the presidency a third time is based (exclusively) upon the example of Washington and the declarations of Jefferson." He was bound to know, and, if he read the paper he was answering, he did know, that I, as well as all the friends of the two-term rule, based our support of it upon the additional authority of Madison, Monroe, and Jackson, who greatly strengthened the principle, and increased the value of the precedent by repeating it. They stood as palpably in the way of the third-termers as Washington and Jefferson; and yet Mr. Boutwell has not a word to say against them. I take this as an acknowledgment that they too have a title to general veneration which can not be questioned. All of our great exemplars are allowed, at least for the present, to pass with the luster of their reputations



undiminished. For this I can but renew the expressions of my gratitude to Mr. Boutwell and the other strong-government men, for whom he speaks.

But the rule is not established only by the example and precept of the retiring Presidents. It has a still broader and deeper foundation in the collective wisdom of the whole nation, which is the highest source, the best authority, and the strongest support of all law.

Mr. Boutwell tries to disparage it by saying that Washington, Jefferson, and Madison could not have believed in it, else they would have made it a part of the written Constitution. He says, substantially, that, if they had thought a limitation upon the tenure of the executive office proper or necessary, their failure to put a provision for that purpose into the organic law was a disregard of their duty so gross that it admits of no excuse or apology. This is an attempt to reason falsely from perverted facts. Mr. Boutwell would never have tried it if he could have kept clear of it; but he had to construct his argument out of the materials which the strong-government men gave him, and this was the best they could furnish. The known truth contradicts every word of it.

Washington and Madison acted throughout the session of the Convention in steady opposition to unlimited re-elections. How or why the provision came to be dropped out of the plan at the very close of the session needs no explanation here: it is certain that Washington and Madison were in no wise to blame for it. They both thought it a misfortune, and to this conviction all their conduct was faithful afterward as well as before. When Jefferson, who had been absent on the mission to France, returned home, he conferred with them and others on the best mode of remedying this and some other defects in the instrument; but, fearing that a serious or protracted opposition might cause it to fall through altogether, they concluded to advise its immediate and unconditional ratification. The certainty that Washington would be the first President, and the belief that his example would make a law as effective as any that could be framed in written words, reconciled the country, and gave the whole people faith in the perpetuity of their institutions. That Washington considered a third term as leading to the overthrow of the Government, and intended his own retirement to be a precedent which would shield us from that danger, is a fact so notorious that Mr. Boutwell himself can not shut his eyes upon it. After saying (p. 375) that Washington "yearned for the peace and quiet of private life," he adds this remarkable language—remarkable, I mean, as coming from him: "*Nor can there be a doubt that, superadded to these personal considerations, was the thought that his example might serve as a restraint in case of the appearance of a popular leader who should seek to subvert the Government through successive elections.*"



Truer words than these were never spoken. But they are not all the truth. Mr. Boutwell should have added that Washington's retirement was then and there accepted by the nation as supplying the want of a written interdict upon a third term; as filling up the *casus omisus* in the Constitution; as making a part of our free institutions; as interposing a safeguard against a subversion of the Government by successive elections—as the beginning of a custom which should have “no variableness, neither shadow of turning.” If anybody suspects me of overstating the case, let him look at the record and be satisfied.

In December, 1796, Washington opened the session of the last Congress that assembled under his Administration, as was his wont, with a speech, in the course of which he simply referred to the situation in which he stood for the last time in the midst of the people's representatives. The answer shows what construction was then given to his conduct in declining a third election; how gratefully it was accepted and how highly it was appreciated as a precedent for the future. The representatives, speaking for themselves and the nation, of whose hearts they believed themselves the faithful interpreters, said that “that event of itself *completed* the luster of a character already conspicuously *unrivalled* by the coincidence of virtue, talents, success, and public estimation.” This act, like his resignation as Commander-in-Chief, they affirmed to be “no less rare to mankind than *valuable to a republic*”; and concluded thus: “For your country's sake—for the *sake of republican liberty*—it is our earnest wish that your *example* may be the guide of your successors, and thus, after being the ornament and *safeguard* of the *present* age, become the patrimony of our *descendants*.”

Jefferson's adoption of the Washington precedent was more universally approved than any other act of his pure and beneficent life, and the reasoning by which he showed that a third term was inconsistent with the safety of the republic has never been controverted by his worst detractors. By the time Madison served out his two terms, the rule had become so firmly fixed in our system that even the Father of the Constitution, fresh though he was from a victorious struggle with the enemies of the nation in Old England and New England, could have done nothing either to strengthen or to weaken it. It is true also of Monroe, that nothing was left him but implicit obedience. He treated the two-term rule as a settled institution, and, if he had shown the slightest sign of disrespect for it, he would have lost forever the unbounded popularity which he had won by long years of virtuous service.

Jackson was as faithful to it as any of his predecessors, and believed as devoutly as they did that the continuance of one man in the presidential office for an indefinite time was in deadly conflict with the fundamental idea of a republican government. But he



doubted the stability of the custom. The fervent love with which he was wedded to his country made him jealous of the efforts which might be used to debauch her virtue. He had seen strong government raise its head almost as impudently as we see it now. In defense of the Constitution, he so wounded the monster that most men thought it forever disabled. But he was fully conscious that he had "scotched the snake, not killed it." He feared that some adventurous enemy of equal rights, aided by a combination of special interests with corrupt politicians, would contrive an excuse for breaking through the unwritten law and get a following large enough to do it. To prevent that calamity he proposed an amendment to the Constitution which would put an express limitation on the right of re-election. His view was not concurred in. The representatives of the people and the people themselves thought the custom as strong as any amendment could make it. Jackson, acquiescing, was content to strengthen it by adding his own example to the others.

From that time to the summer of 1875 the wisdom or necessity of the two-term rule was never questioned. Nobody denied its binding force on the national conscience, and the current of popular feeling in its favor, like a great river receiving its affluents from every region it drains, became wider and deeper as it rolled down through the ages. Of this, the most unmistakable evidence that could be given is the rebuke so solemnly and unanimously administered by the House of Representatives to General Grant when he began to be pressed for a third election. That resolution was received with a shout of universal approbation. Mr. Boutwell's studied abstinence from all allusion to it shows that he believes it to have been the true expression of a determination to stand by the two-term rule, and guard it well against the venal ambition which, by breaking it down, would bring our free institutions into peril. Both the Congress of 1796, which thanked the Father of his Country for making that salutary precedent, and the Congress of 1875, which refused to abandon it after eighty years of use, faithfully interpreted the heart of the nation; each was a mirror of existing public opinion; and each "gave to the very age and body of the time its form and pressure."

Our Saxon ancestors had certain *customs* which made them the freest people then in the world. Few of those customs were so well established as this one of ours by uninterrupted use and universal consent; but they were customs generally acquiesced in, and therefore laws which enlarged their own liberties and defended their rights against the encroachments of monarchy. Then rose a king, greedy for strong government, and anxious above all things to abolish the popular customs which limited his power. He and his corrupt parasites tried all that in them lay, now by insidious wiles and again by



threats of force, to get a surrender of those customary rights. But the barons, speaking for themselves and for the freemen under their protection, gave him that memorable answer, simple to be sure, but made sublime by the occasion: "*Nolumus leges Angliæ mutare.*" ("We will not change the laws of England.") This substantially was the answer which Grant got from the Congress of 1875 when he wanted to abandon a time-honored custom which was "part of our free institutions." May God forbid that he or his minions should ever have any other!

Mr. Boutwell protests most vehemently against the binding obligation of a custom; he asserts that the tradition of the fathers with respect to a third term can never have the effect of a written restriction—that the tradition in question is not what Congress said it was in 1875, a part of our free institutions; that it is a mere opinion entertained by men of a past generation, but entitled to no controlling influence at the present time. He will not condescend to give reasons for this judgment; "statement," he says, "is sufficient; argument is unnecessary." And here is the statement: "We *refuse* to allow the *hands* of *dead* men to control the *soil* of the country; and shall we without inquiry, without a judgment of our own, permit the opinions of dead men to control the thoughts and the policy of the country?" (p. 373).

It is a pity to take the conceit out of a gentleman who is so happy in his contempt for dead men. But it is necessary to tell him that this is not merely an impious violation of the fifth commandment, but an utterance void of all reason and sense. It is a bald absurdity to say that we *refuse to allow* dead men's *hands* to cultivate and use the soil; for the hands of dead men were never offered to us for that purpose. If it be meant to say that our right in the soil is not defined, and our use of it regulated by the laws, customs, conveyances, and testamentary writings of dead men, then the writer does not at all know what he is talking about; for in that sense the soil *is* controlled by dead men. Precisely the same is true of public affairs. While dead men do not vote at elections, or collect taxes, or fight in the army, or sit in the courts, yet their decisions, customs, opinions, traditions, and enactments define the limits of power, protect the liberty, regulate the policy, and control the thought of the country upon all subjects, religious, moral, and legal, as effectually as if they were still alive. Without this control, society would go all to pieces in an hour. Without it we could have neither church nor state, nor family nor social existence. We *must* be so governed; and it is the mere drivell of communism to say, "*We refuse.*"

Why may not a custom like this become binding as a law? Congress, in December, 1875, declared that it was binding law, which could not be disregarded without bringing our free institutions into great

danger ; therefore, it ought to be strictly adhered to, and all the people said, Amen ! But Mr. Boutwell considers this a mere notion, supported by nothing better than rhetoric. Let him and his disciples reflect on it a little further, and see if they are not mistaken.

It is a principle of universal jurisprudence, which prevails in every civilized country, that a rule of public or private conduct spontaneously adopted and continuously observed, becomes the law of the subject to which it relates, and is perfectly binding on the conscience of magistrate and people, provided it be reasonable and just in itself, notoriously practiced, of long standing, generally acquiesced in, uniform in its operation, uninterrupted in its course, and not in conflict with any law of paramount obligation. Such a custom is, always and everywhere, held to be especially sacred when it is intended and used as a restriction upon political power or a safeguard to civil liberty.

That the two-term rule is coeval with the Government, consistent with the Constitution, notorious, uniform, uninterrupted, and unopposed for nearly a century, is, as matter of fact, undenied and undeniable. It has, therefore, all the requisites of a binding law, unless its opponents can show it to be intrinsically an unreasonable or bad rule. But I affirm that the custom is salutary, wholesome, and good ; and this I can prove to the hearts' content of all third-termers, by their own spokesman, Mr. Boutwell himself.

He opens his article thus : " In politics, morals, and law, there is a field for presumption." If he had been willing to " talk less in King Cambyzes' vein," he would have said that in those sciences, as in all others, a truth may be shown by presumptive as well as by direct evidence. What, then, are we to presume concerning the custom in question when we look at its origin and history ? Begun and carried out by the foremost men in the world, it was accepted from the first, and upheld to the last, by the collective wisdom of the whole nation. Does not this raise a presumption—too strong to be resisted by any sensible man—that the rule is just, proper, and necessary ?

But, added to this, I can produce Mr. Boutwell's *positive* testimony. I am aware that a cause is not logically lost because one of its defenders contradicts himself when he speaks upon it. But, where the authors of a new political scheme put forward one of their number to reconcile its opponents by displaying its merits, and the advocate admits that it has no merits, it is perfectly fair to take him at his word. The confession in this case is none the less useful because it is grudgingly made in little pieces which lie about, here and there, in mere confusion. It is vexatious to pick out these fragmentary revelations, but we must take the trouble. Like an unwilling witness under pressure of his conscience, the truth oozes out of him drop by drop, and we must patiently catch it as it comes.



He says, *totidem verbis* (on p. 376), that the authorities in favor of the rule are good ; that the "experience of Europe gave rise to an opinion in America that it was dangerous to permit the chief magistrate to remain in office for a long time," and then admits that "when there was no trustworthy history either for warning or example, except that of ancient Rome and the history of the mediæval and feudal states of Europe, the argument [to wit, the argument which proves the rule to be necessary] was *not* bad." Elsewhere (p. 375) he discloses his knowledge that the argument against a third term at that time, instead of being a bad one, was good enough to make Washington and his compatriots determine to prevent it by his example, and thus save the Government from subversion. Does Mr. Boutwell assert that anything in the history of the world has occurred since then which ought to weaken our faith in the value and importance of the rule ? Certainly not ; on the contrary, he confesses that "Washington's example was set off and made more impressive by the phenomenon of a Corsican corporal, passing as it were at a bound from the ruins of a republic to the throne of an empire" (p. 376) ; and he might have added that in the same country, at a later period, another republic was ruined in a way which made the warning still more striking. But Mr. Boutwell's confession is fuller yet. In the following passage (p. 375) he makes a tolerably clean breast of it. Speaking of the "general disinclination of the American public mind to the election of the same person to the presidency a third time," he goes on to say : "It is, however, as old as the Government. It had its roots in the experience of the colonists. In Europe hereditary power had fostered standing armies, and standing armies had maintained hereditary power. Both were the enemies of personal liberty and popular rights. It was the purpose of the founders of our Government to render standing armies unnecessary, and the possession of hereditary power impossible. If the experience of a century is an adequate test, the end they sought has been attained. They had observed, also, that the possession of power, by virtue of office, for unlimited periods of time, tended to the establishment of dynastic systems, and to their recognition by the people. Hence, provision was made in all our Constitutions, State and national, for frequent elections in the legislative and executive departments of Government."

This certainly is as plain an acknowledgment as can be made that continued re-election is dangerous to personal liberty and popular rights, and that the two-term limitation, or something equivalent, is necessary to save the Government from subversion by standing armies and hereditary power. The rule we contend for is, therefore, wise and salutary, the third-termers themselves being judges. Not only is that settled : it is undeniably fixed that the custom has all the other requisites of a good and valid custom—age, notoriety, constant



observance, and consistency with previous regulations. For those reasons it is and must be a valid law, technically as well as morally binding on the country. No American citizen who obliges himself, by oath or otherwise, to obey the laws, can honorably violate this rule or counsel opposition to it, for it is not only law, but fundamental law—*lex legum*—a law of laws—confessedly necessary to preserve all others from destruction.

Mr. Boutwell begs the whole question when he says that the apprehension so universally felt of great danger from repeated re-elections of the same person did *not* lead the founders of the republic to the adoption of a *system* which limited the right. It *did* lead them to that very thing. The written Constitution is silent, to be sure, but, on the earliest occasion after it went into operation, the omission was supplied by a custom which then became, and now is, a part of our *system* as much as anything else it contains.

Without summing up Mr. Boutwell's confessions, it will be plainly seen by every reader that he has yielded all points. The third-termers put up the best man they could find to defend them, and he honestly but reluctantly gives away their case. It requires some boldness to ask for a judgment after that. But Mr. Boutwell's courage is not wanting in the last extremity. The two-term rule may be right in law and morals, but he despises it; it may be strong, but his determination to break it down is irrepressible.

One argument, totally apart from the merits of the question, is used with immense success by Mr. Boutwell and all third-termers who have written or spoken on the subject. Not one of them neglects to urge with all his might that opposition to a third term and General Grant is a sentiment almost if not quite universal with Democrats. This converts our rancorous enemies by the score: an appeal to blind partisan malice is never made in vain. In this discussion and for the present purposes of strong government it is the most irresistible of all arguments, more potent than Cicero's best oration, more effective than all the logic of Aristotle, more powerful than the eloquence "that shook the arsenal and fulminated over Greece."

We have no answer to this charge of democracy. With all humility we plead guilty, and throw ourselves on the mercy of the third-termers. We *are* Democrats. We believe in the Constitution, and in the sanctity of an oath to support it; in the traditions of the fathers, and the principles of free government as settled by them. We have held fast to this faith. We never surrendered or sold or gave up our heritage. When it was stolen from us we cried out upon the robbery, and reclaimed our rights as soon as reclamation was possible. In the courts we struggled with our utmost strength for the restoration of trial by jury and the privilege of *habeas corpus*; on the hustings, in popular conventions, and in legislative assemblies we protested



against the domination of carpet-bag thieves, and exposed remorselessly the dishonest measures by which we saw the public treasury plundered. We thought it a good tradition of the fathers that the military power should be subordinate to the civil authority; and, when we saw elections carried by the bayonet, Legislatures forcibly tumbled out of their seats, and the basest scoundrels in the country placed by brute force in the offices to which honest men had been elected, our sense of right and justice was shocked beyond expression. We thought the right of the States to elect their own officers and their own representatives in Congress by the free suffrages of their own people was clear as the plainest constitutional law could make it. We therefore looked with loathing on the systematic violation of this great right, carried on for years by the Federal Administration; and none of us could be reconciled to the great swindle of 1876 by which the whole nation was basely cheated.

This is what democracy has led us to. Doubtless we are great sinners in the eyes of Mr. Boutwell. Not to have given up these principles is a crime for which he can not forgive us. But he ought not to blame us too bitterly. We could not help it. We were brought up to revere the founders of the republic, and to obey the laws and customs which they handed down to us. Instinctively and by habit we loved free institutions, honest observance of oaths, and good faith in the execution of public trusts. In all this Mr. Boutwell differs from us *toto celo*. But can he not make some allowance for our prejudices against fraud, perjury, and corruption, unreasonable as those prejudices may seem to his superior wisdom? It is hoped also that he will be somewhat conciliated when he recollects that our delusions are encouraged by a very general concurrence in them: the white men of the Union by a million majority expressed their approbation of our views at the last presidential election, and even negroes by the hundred thousand refused to condemn them. Moreover, it is not true that Democrats alone are opposed to a third term. Republicans—a large majority—not knaves and cowards, and not “metallic calves,” but the best men in the party—are as much opposed to it as we are. This consideration should silence Mr. Boutwell’s mere partisan rhetoric, disarm his wrath at once, and “check his thunder in mid-volley.”

He strikes another blow which hits us hard. He says, in effect, that the old Government is so battered up that no respect ought now to be paid to any principle of its founders. I quote his words (p. 273): “We have changed, indeed in some particulars we have *annihilated*, the Constitution of Washington, the Constitution of the Fathers. . . . And is the unwritten law more sacred? May the people *annul* the written law of the fathers, and still be perpetually *bound by their traditions*?”

This is extremely well put, “with good emphasis and good discre-



tion." I am compelled to admit that they (Mr. Boutwell and his political associates) have annulled the Constitution, not in some, but in all particulars. No line or letter of it has escaped their destructive hands. Every right of the States and all personal liberty have been wantonly outraged. Trial by jury, *habeas corpus*, free speech, the elective franchise, everything that tended to promote the great objects for which the Constitution was made, were trodden down. The military was placed above the civil authority, and the power continues to be claimed for standing armies to "shed the blood of war in peace." To nullify the most important part of our great charter, a bill of pains and penalties against ten States and eight millions of people was forcibly injected into the bowels of the Constitution itself, and there it lies to this day, side by side with the provision which forbids its existence. Certainly I agree with Mr. Boutwell that the written instrument by which our fathers sought to secure the blessings of liberty to themselves and their posterity has been wholly set at naught, and his tone of triumphant interrogation is not out of place when he asks, "Is the unwritten law more sacred?" Assuredly it is not. A conscience which is hardy enough to spurn the restraints of the written Constitution need not affect any remorse for refusing to accept a tradition. Having swallowed that camel, it is but the folly of the Pharisee to strain at this gnat.

But Mr. Boutwell, being a charitable and fair man, will, I am sure, excuse us for adhering to the tradition, though it be connected with the Constitution which his party has broken and dishonored. We see the whole subject from another point of view. We expect the restoration of popular liberty; we hope soon to replace our institutions upon the firm foundation which our fathers laid. We have already made much progress. Many of our violated rights have been vindicated in the courts; oppressors have been scourged back into private life; the thieves who ruled us for their pleasure and plundered us for their profit are on the run; a majority of the States, both Houses of Congress, and the unbroken heart of the nation are with us; and but for the atrocious fraud of 1876 no remnant of Asiatic despotism would disgrace this country now. The argument that the two-term rule is useless to uphold institutions already overthrown will become plainly inapplicable when the structure is completely rebuilt. When the ship of state is again put on her constitutional tack, this traditionary rule of navigation will be as necessary as ever to make her course true and her progress safe.

There is another reason why we can not afford to abandon any custom which favors civil liberty, even if the written Constitution be considered as hopelessly abolished. Our fathers were freemen before the Constitution; that instrument defined certain pre-existing rights established by custom, and provided an organization for defending



them. Suppose the definition to be obliterated and the defenses thrown down, would that make us slaves? No; in that case we would fall back on the unwritten law. We would stand upon the colonial customs, or seek protection under the common law, tracing it, if need be, to the reign of Edward the Confessor or Alfred the Great, or finding its sources in the still older customs of our German ancestors. If all this fails, we will appeal to the great unwritten law of Nature—the law that Hooker speaks of when he says, “Her seat is in the bosom of God, and her voice is the harmony of the world.”

Americans who are true to themselves and one another can not afford to give up a custom which is “part of our free institutions,” merely because previous wrongs have deprived them of other parts. On the contrary, the losses already sustained should make us cling all the more closely to what is left. This excuse of Mr. Boutwell for his proposed violation of the two-term rule will pass for a good one only with men who are hostile to all free institutions.

Here rises the most important of all questions: What is the ultimate object of the third-termers? Why these desperate efforts to push on a third-term candidate in the face of an opposing sentiment expressed by all parties, manifesting itself in all places, and certain to be felt at the polls if the election be a free one? Friends of republican government, who respect the popular will, could not act thus. Even demagogues, who want votes as a mere means of getting offices and jobs, do not usually endanger their own success by dragooning the common file of their supporters. Without the principle of patriots, without the prudence of partisans, the third-term men must have some purpose inconsistent with both. The general belief is, that they mean to force the nomination of Grant, then coerce a false count of the votes, and finally subjugate the nation to their personal rule. If this prevailing opinion be erroneous I am not responsible, for I have been among the last to adopt it. But there certainly is some evidence tending to show that the designs of the Grant men are at enmity with existing institutions, and so far revolutionary that they would be called treasonable if treason here, as in England, consisted in seeking to compass the death of the Government.

At a very early period in our history the enemies of republican principles were thoroughly equipped, and entered actively upon the struggle for supremacy. Some of them got into the Convention which framed the Constitution. At their head was Hamilton, who laid before the body their whole plan for a central government, which, if adopted, would have completely extirpated the rights of the States and the liberties of the people: a Chief Executive for life, unimpeachable for any misconduct; a Senate for life; a triennial House of Assembly; a Federal judiciary “for the determination of all matters of general concern”; the Governors of the States to be appointed by the



President. Of such a government, the tyranny and corruption must have become perfectly unendurable if administered, as it was expected to be, by the men who proposed it; and doubtless it would, in a very short time, have led to a monarchy in name as well as in substance. But the Hamiltonian plan was defeated, and under the auspices of Washington, Madison, and their compatriots the present system was framed, by which certain powers, specifically enumerated, are bestowed on the General Government, while all others are expressly reserved to the States and the people; and this system is to be administered by agents of the people's choice, strictly accountable, subject to frequent rotation, and sworn to keep within the limits of their legal authority. This government, so simple and so clear, so definite in all its arrangements of power, and so guarded against abuse, was hailed at home and abroad as the best result of political wisdom that the world ever saw. I devoutly believe that the estimate of its friends was right, but I have no eulogy to make on it now. I merely claim that our obedience to it is due as a moral necessity. If a sworn officer willfully violates it, he is guilty of perjury; if its commands be habitually disregarded, the nation is politically ruined, and the people are defrauded of their rights.

But from the very first it had enemies, who tried to subvert it and substitute in its place the reign of arbitrary power. There has always been an unprincipled faction, composed of persons who tried to rid themselves of the wholesome limitations which protected the equal rights of the States and the people. By frequent changes of name and the assumption of new shapes, by appeals to the baser passions, by combinations of special interests, by plausible but false interpretations of the fundamental law, by adroitly taking advantage of accidental circumstances, they have often succeeded in "drawing much people after them"—people who really loved free institutions, and had no intention to destroy the Government or depart from the traditions of the fathers. When their designs became known, the honest portion of their followers have uniformly fallen away from them. Perhaps no instance of this is more striking than the direct and positive refusal of the great mass of the Republican party, in 1876, to endure the nomination of General Grant for a third term.

That the present movement to that end means simply a conspiracy to wipe out the Constitution once for all, and have done with its restraints upon arbitrary power, is proved in so many ways that it admits of no doubt. It is publicly urged by all its friends for the sole reason that General Grant is a *strong* man. In the cases of Caesar, Cromwell, and both the Napoleons, strength was the quality for which they were elevated to absolute power. It is the *might* of the ruler that overcomes the *right* of the people whenever a re-



public is to be strangled. Strength that governs with a rod of iron is always the recommendation of one who is to be made a monarch, insomuch that the word "king" (*Koenig*) signifies, in the language we take it from, exactly what General Grant's adulators habitually call him—the strong man.

But the strong-government idea has been set forth by its projectors in various authorized publications, manifestly intended to prepare the minds of the American people for the advent of despotism. Before Napoleon mounted the throne, certain well-remembered articles appeared in the "Moniteur" to foreshadow the empire that was coming, to prove that a republic was too weak to be compatible with the interests of France, and to show that nothing would do but the strong government of one strong man. Precisely similar were the approaches of the other Bonaparte to absolute power. Here we have almost a repetition of those French articles. One of these, anonymous, but printed in a magazine of high authority, describes the Constitution of the United States as an effete system, adjudges State sovereignty to be treason, declares the masses of the Northern Democracy unfit for self-government, anticipates that the South will cease to be formidable after the next census, and then gives a picture of the good time coming, when a central Government, with the States under its feet and the people at its mercy, shall exercise a controlling supervision over all elections, and regulate all domestic subjects down to marriage and divorce. What sort of a head this strong Government shall have, or how he shall be called, is not disclosed; but we are told to look for a change in the mode of choosing him, the present plan being antiquated and clumsy.

But the most alarming evidence I have seen that the friends of a "third term and General Grant" are plotting the overthrow of the Constitution is in Mr. Boutwell's own article. He knew when he wrote it that designs utterly hostile to our free institutions were imputed to him, his faction, and his candidate; that the accusation was believed by very many of the most influential men in the Republican party; and that it was almost universally thought to be true by the Democrats. He could not help but see, in the paper which he was undertaking to answer, that the strongest objection to the movement for Grant was its anti-constitutional purpose. He was also fully aware that nineteen twentieths of the American people are true to the Government of their fathers, which they desire to see honestly administered, and are totally opposed to any kind of personal rule stronger than the laws. Yet Mr. Boutwell puts in no word of denial. Why does he stand mute under a charge which so seriously affects, not only the political, but the moral integrity of himself and his associates? No sane man can hesitate for a moment to interpret this silence as a consciousness of guilt.



But, besides this dumb eloquence, there is something more in that same paper.

In all countries and in all ages it is the uncontrollable impulse of public oppressors to call every man a traitor who is not willing to be a slave. In the eyes of the usurping tyrant and his sycophantic flatterers the most odious crime that can be committed is the assertion of his legal rights by a freeman. This crime Mr. Boutwell charges upon the Democracy, and gloats over the punishment they will get for it. He says (p. 373) that "the *spirit of rebellion*, of resistance to the Constitution, is manifested by a large class of citizens. These citizens, *without exception*, are Democrats, and they receive aid and encouragement from the Democratic party."

Of course, I will not vouch for the absolute perfection of every individual who claims to be a Democrat. But that Democrats, as a body, or by party concert, have resisted the Constitution in any manner, or that they have not submitted even to the unconstitutional tyranny of the Federal Government with entire passiveness, is a falsehood so vile, so gross, and so palpable that I will not believe Mr. Boutwell meant to assert it. What he did mean was to say that we have claimed our just rights by legal and peaceful appeals to the public conscience, in the courts and on the rostrum, at the polls, and through the press; and he but speaks after his kind when he calls this the "spirit of rebellion," for, according to his theory, lawful opposition to unlawful power is always constructive rebellion. He is consistent with his creed when he warns us that this spirit shall be wholly extinguished, and that Democrats for indulging in it shall be remitted to a state of abject slavery, and deprived of all right to control their own affairs, either political or private; and, to that end, all traditionary notions of liberty, equality, and fraternity are to be set aside. "It is the *purpose* of the Republican party," says Mr. Boutwell (page 373), "*to suppress that spirit*, to render it *powerless absolutely*, both in personal and public affairs, and it may happen that in accomplishing this result the *example of Washington and the tradition of the fathers will be disregarded*." While I do not think that a majority of the Republican party would assist for one moment in carrying out this brutal threat, Mr. Boutwell is ample authority for the belief that the Grant leaders are not only insolent enough to utter it, but base enough to execute it, if they ever get a chance.

It is plain enough what prompts them to these desperate measures. When the elective franchise was given to the negro they thought they had legalized a sure mode of stuffing the ballot-boxes, and, so sustained, strong government promised to itself a life without end. But in the course of time the negroes ceased to stuff, and some of them began to vote. This was so contrary to all previous



calculations, that the friends of strong government could not realize it; they thought it must be caused by some mysterious application of physical force. To this day Mr. Boutwell is unable to comprehend the possibility of a free negro voting of his own head against a carpet-bagger who has robbed him, against a Freedman's Bank that has swindled him out of his earnings, or against a scurvy politician who has cheated him by false promises of forty acres and a mule. Therefore, he believes in the chimera of a bulldozer as much as Cotton Mather believed in witchcraft, and swallows as greedily the false and unreasonable evidence which feeds his credulity. He declares in this article that in the Southern States "any number of citizens are as a public policy of communities and States deprived of their civil rights"; that offices are held there, and power wielded, "through proceedings that are systematically tainted with fraud or crimsoned with innocent blood"; that "one vote of a white citizen in South Carolina is, as a fact in government, equal to three in Massachusetts, New York, or Illinois"; that there are persons in Congress who have no right to their seats, "and these persons constitute the majority in both branches." These monstrous outrages upon the known truth admit of one excuse and only one—Mr. Boutwell believed them.

But the sincerity of his belief in these false statements is no excuse for the pretense he makes of honest indignation. That is a sham, and he knows it. He and his *collaborateurs* in the strong-government enterprise (including the strong man himself) have no conscientious objections to false or forced elections. They have no respect whatever for the right of the people to choose their own officers, State or national. The strength for which they laud their chief so extravagantly was never exhibited during his presidency, except in coercing voters, suppressing true returns, or otherwise defeating the legal expression of the popular will. Mr. Boutwell is, therefore, in no condition to speak on this subject as an accuser of others; the beam in his own eye disqualifies him to hunt for motes in the eye of his brother. Nor could he do General Grant any good even by showing that elections are now unfairly conducted. We desire, above all things, to have a free poll and a fair count, and we are much afraid that we will be permanently deprived of our right; but we do not look to Grant for redress or remedy. We do not trust the arch enemy of honest elections to purify the ballot-box; for that would be "casting out devils by Beelzebub, the prince of devils."

I will make Mr. Boutwell a proposition. If he will name any kind of violence or intimidation which the Grant faction have *not* used to prevent a true poll, or any form of fraud which they have *not* practiced to falsify returns, or any sort of cheating in the count which they



have *not* resorted to, or any species of the *crimen falsi* which they have *not* perpetrated as a means of swindling the majority; if they have *not* filled the seats of Congress with impostors whose object it was to misrepresent, injure, and degrade the States they pretended to come from; if they did not falsely procure the election of infamous men to every kind of State office, or when defeated put them in possession and maintain them there by force of arms; if they did not in 1876 defeat the known will of the nation by a most stupendous swindle—if Mr. Boutwell can show that these things and others like them were not done at divers times and places, under the auspices and with the approbation of General Grant and those friends of his who are now pushing him for a third election, then I will give up the whole case and promise to vote for his candidate. There! he has a chance to make one vote, without the risk of losing his own; for, if he fails, I will not ask him to vote my ticket; I will merely insist that he shall not hereafter turn up the whites of his eyes and pretend to be wounded in his virtuous soul, when a fugitive carpet-bagger tells him how he had to drop his plunder and fly for his crimes, because negroes were bulldozed at the South.

General Grant's own history and character as a civilian make it certain that those who support him are enemies of free and honest government. These third-termers are not madmen. They have tried Grant, and they know what he is good for. Those acts of deadly hostility to the Constitution which distinguished the period of his Administration they expect him to repeat. Those atrocious corruptions which made it the golden age of the public plunderer they look for again. I affirm that they intend this, not because they have said so in words, but because, being sane men, they can intend nothing else.

Doubtless he is a strong man—not mentally or morally strong—but quite strong enough with an army at his back to spurn the restraints of law and break over the Constitution. It took a strong man to make such governors, and judges, and treasurers, and legislators as he made for the States, and to hold them in place by the bayonet; to force elections against the will of the electors, and to inaugurate a President who had been rejected by the people.

One manifestation of his strength has hardly excited so much admiration as it deserves from his followers. During his last term he took from the Treasury, in flat defiance of the Constitution, one hundred thousand dollars in addition to the hundred thousand which was his legal salary. There was a transaction of Cæsar's with the Roman treasury not dissimilar to this—and Cæsar was a strong man; but Grant, more than Cæsar, showed that peculiar contempt of law which by his admirers is supposed to be *strength*.

Sometimes they tell us that he is not only strong, but faithful. Faithful to what? To his own breeches-pocket; to the rich men who



made him presents; to the carpet-bag thieves whom he fastened on the Southern States; to the corrupt rings that supported him in the North; to the returning boards who forged election-papers to suit him; to the tools of the vulgar force which thrust his fraud down the throat of the nation—to all these he was faithful enough; but faithful to the Constitution and laws he never was. From beginning to end of his Administration he was treacherous to the most sacred trust that human hands can hold.

This is no railing accusation against General Grant, no harsh construction of his past acts, no detraction from his claim to a certain degree of personal respectability, no proof that as a despot he would not do as well as another. He is a mere soldier, with no knowledge of law and no conception of the purpose for which civil institutions are made. When elected President, he took the Government on his hands as a mere job to be done for the interests of those who employed and paid him, without caring what rights of other persons might suffer. Horace's description of a military chief governing strongly in civil affairs has never in modern times been so perfectly realized:

"Jura negat sibi nata; nihil non arrogat armis."

He did not stop to inquire what was in that Constitution which he swore to preserve, protect, and defend; if he had taken an oath to destroy it, his hostility would have been neither less nor greater. If there be one provision of the Federal compact more perfectly clear than any of the others, it is that which reserves and secures to the States all sovereign authority, jurisdiction, and powers, except what are specifically enumerated and expressly given to the General Government; but, clear as this is, General Grant never could see it. When a politician came to him (especially if he came with a present in his hand), and told him that the States had no rights, and the doctrine of State sovereignty was mere treason, he believed it firmly and acted accordingly. He himself has furnished conclusive proof that, when he stretched forth his rapacious hand and took from the public treasury a hundred thousand dollars more than his lawful salary, he had never read or heard about that part of the Constitution which forbids the compensation of a President to be increased "during the term for which he shall have been elected." It probably never struck him that it was bribery to accept money and lands and goods from men whom he immediately afterward appointed to the highest offices in his gift. When to this is added the proneness of ignorant ambition to that Cæsarean rule of ethics which declares everything right which is done *regnandi causa*, you have a character dear to the heart of strong government, but utterly unfit to be trusted by a people who desire to be free.

However that may be, all evidence shows that the object of pushing

General Grant for a third term is not to give us an honest and legal administration of our public affairs, but to set up some system of absolutism without law, or, as Mr. Stevens said, "outside of the Constitution." What form or title shall it have? If its projectors succeed, will they give us an imperial despotism, open and avowed? Or will they curse us with the heavier and more degrading affliction of a rotten republic?

If my soul could come into their counsels, or mine honor be joined unto their assembly, I would tell them that their success now will bring them hideous ruin in the long run. For a little while it may increase their fortunes, or swell their personal consequence, and gratify their contemptuous hatred of the States and people under their arbitrary rule. But strong government is a weak contrivance, after all, and never lasts. Its front is of brass, but the feet it stands on are always made of clay. Let those who would identify their interests with Grantism think well how unsafe is the protection they are seeking.

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#### THE ELECTORAL VOTE OF LOUISIANA.\*

*To the Editor of The Union:*

I COMPLY with the request to state my views concerning the electoral vote of Louisiana, in the hope that I may thereby do some little service to the cause of peace, good order, and honest government.

By the Federal Constitution and the laws of Louisiana the people of that State in their primary capacity (and they only) have a right to appoint electors of President and Vice-President. This power has been executed at the time, at the places, and in the way prescribed by law. In accordance with the universal law of all elective governments, the intent and will of the whole people as a body is spoken by the majority of the ballots. They did appoint the Tilden candidates. Their decision to that effect was spoken by a large majority, in the prescribed way, with loud emphasis.

Nevertheless, certain State officers of notoriously bad character have conspired among themselves and with other evil-disposed persons to hinder and prevent the appointees of the people from performing the duties assigned to them by their constituents and to organize an electoral college composed of other persons having no authority except what they derive from the fraudulent favor of the conspirators themselves. All this is done to the intent and with the design that a false vote concocted by a bogus body may be sent up, cast, and counted as if it were (what it is known not to be) the true vote of the State,

\* Washington, D. C., "Union," December 7, 1876.



certified by the true electors. If it be so received and treated by the other States and their representatives, then a rule is established which takes the power of choosing our Chief Magistrate out of the hands in which the Constitution is supposed to have placed it, and gives it, without reservation, to any combination of swindlers who may, by fraud or force or accident, get the machinery of a State government into their possession. If this be submitted to without opposition, and as a wrong for which there is no legal remedy, it is not probable we will ever have an honest election again.

What I have here said is a very moderate statement of the case as alleged by the Democrats of Louisiana, and by other perfectly reliable gentlemen, who have carefully investigated the subject. They declare that they can prove the averments here made, with aggravations tending to deepen very much the criminal coloring of the acts done and contemplated by their adversaries. I assume that they will in due time furnish to Congress and to the country such proof as will justify these allegations and establish their truth.

The question then arises whether there is or is not some legal authority by which this frightful wrong can be remedied. If the Constitution has not given to somebody the right to arrest a fraud before it defeats the known and legally-expressed will of the people on such a subject, then they have retained it in their own hands, and they must compel obedience by their own physical force, or else surrender their right of self-government altogether. A construction of the law which logically leads to such a conclusion can not be the true one. In England a disputed title to the crown can only be determined by civil war. But surely our wise forefathers did not intend to put themselves or us—their posterity—in that forlorn condition. They certainly meant that a spurious claim to the Presidency should be set aside in some peaceable way by a judgment whose authority all must respect, and without a resort to the *ultima ratio regum*.

In opposition to this view of the case, there are those who seem to expect that General Grant will take it upon himself to settle the controversy with the aid of the army. In ordinary times this notion might be treated with derision. But our President for the time being has superintended State elections with the bayonet, seated Governors who were not elected, tumbled legislative bodies out of their halls, and done divers other things which show that he has very curious views of his own powers and duties. Still, it is not likely that he will carry things to the point of making war upon the people for electing Tilden, or upon their representatives for refusing to count fraudulent votes in favor of Hayes. On the contrary, it is to be hoped most devoutly that when Tilden is declared by the proper authority to be duly and constitutionally elected, he will cease entirely from all lawless meddling with the business, and respond favor-



ably to our earnest and heartfelt prayer for peace. "Let us have peace."

Those who desire to make this particular fraud successful, and to establish a precedent which will make fraud omnipotent hereafter, take the bold ground that any paper purporting to be a certificate of the electoral vote, if sent up to the President of the Senate, and by him opened in the presence of both Houses, must be taken as infallibly true—subject to no scrutiny and open to no contradiction. This is in square conflict with the uniform practice of the Houses; it is inconsistent with the rules which they have deliberately adopted for the exercise of their power and the performance of their duty on such occasions; it is opposed by the opinions of great leading men in the past as well as in the present generation; it has no warrant in the words of the Constitution; it is utterly at variance with the reason of the thing, and it grossly violates the right of the people to be protected by their representatives against imposture and villainy.

The duty assigned to the President of the Senate is very simple. The certificates being sent to him, he must keep them, as he gets them, in faithful custody and close under seal until the day of opening, and then he must open them in the presence of both Houses. When that is done his special function is finished. Because he keeps the packages containing the certificates, and is authorized to break the seals on a day fixed, is he, therefore, to pass upon their validity and force the Houses to receive and count them contrary to their convictions of justice and truth? It might as well be said that the messengers who bring them up have this kind of power.

The votes, being opened, shall then be counted. The Constitution does not say in express words by whom the count shall be made. But the rule of construction which gives the authority to the Houses and withholds it from the President of the Senate is very plain. Judicial power is never inferred from the bestowal of a ministerial duty. When a written law requires evidence to be produced, the weight and value of it is always to be decided, not by the officer or person who brings it, but by the one to whom it is brought, and *before* whom it is laid. Else why bring it at all? A *habeas corpus* law commands that the sheriff shall bring the body of the prisoner before the court or a judge, together with the cause of his detention, and requires that the prisoner shall then be bailed, remanded, or discharged, as justice may require. By whom? Certainly by the court, and certainly *not* by the sheriff. An executor shall lay his accounts before a court of equity, and they shall then be confirmed, corrected, or modified. The statute does not say by whom the decree shall be made, but it is absurd to suppose that it *can* be made by anybody except the chancellor. Depositions taken in a foreign country, under a commission or letters rogatory, are by statute to be sent under seal to the clerk of the court, who shall open



them in presence of the court when the cause is called. Does that give the clerk power to pass judgment upon them? These supposed cases are given for the mere purpose of illustration, and they show by clear analogy that the votes of the States for President and Vice-President are to be counted by the Houses—counted in their presence, in their sight and hearing, under their supervision and control—and truly counted according to their judgment and conscience.

The right, power, and duty of the Houses is to count the true votes of the States only, which, of course, covers and includes the duty of rejecting false votes from their count, if it be known that spurious votes have been placed among them by accident or design.

For certain reasons, which will be given presently, it is plain to us that in case of disagreement between the two Houses concerning their duty to count or reject a vote, the judgment of the Senate must prevail in regard to the Vice-Presidency, and that of the House on the Presidency. Before coming to that, however, we are to consider upon what grounds either House, or both together, can act in rejecting a vote.

It is claimed that the certificate of the State officers, if it be in due form, imports absolute verity—must be taken as infallibly true, and can not be questioned or disputed. This is true doubtless. Congress is not a national returning board, and can not sit to hear appeals from the returning boards of the States—can not rejudge the justice done by the State authorities, or correct their errors. The decision, if it be a decision, of the State authorities is as conclusive and binding on all the world, including Congress, as the judgment of a court of last resort upon a subject within its exclusive jurisdiction.

Congress is bound, therefore, to count the Louisiana vote, unless some fact be shown against the certificate which proves it to be not merely erroneous, but void. If the vote comes up from a body of men pretending to be electors, but who in truth have never been appointed as such according to the laws of the State, their act must certainly be treated as a nullity. Men can not constitute themselves electors, nor be constituted by anybody else except the proper appointing power. Suppose the power of appointment to be in the Legislature. The Legislature, in the prescribed manner and at the proper time, makes its appointment by a clear majority of its votes, which are duly recorded and certified by its officers. Yet the Governor, not only without the consent of the Legislature, but in defiance of its expressed will to the contrary, fixes up a different set of men as an electoral college, and gets them to cast their vote as the vote of the State. Is there an honest man in the country who would be willing to promote the object of such a proceeding by counting the vote of such pretended electors? The case under consideration is precisely analogous to this. Here the power to appoint is in the people who have exercised it; their votes



are counted and recorded decisively, showing their designation of certain persons as their appointees. But the Governor dishonestly takes upon himself and seven associates the duty of voting for President in the name of the State. If this be not a mere bogus college of electors what would be? If these men can cast the vote of the State, what is to hinder any other eight men from doing the same thing?

The right of Congress to throw out the vote of persons not duly appointed has never been denied in the cases of Territories not fully admitted as States, or of States supposed to be out of the Union as a consequence of their rebellion. If you reject the votes of electors because the State *could not appoint, a fortiori*, you must reject the votes of electors whom the State *could* appoint, but *did not*. And the principle applies *a multo fortiori* to the case of persons to whom the appointing power expressly refused the trust and bestowed it on others. Indeed, no absurdity could be more palpable, and none could lead to worse consequences, than a decision that the vote of a State must be taken as it is thrown by any set of persons who claim to do it, without regard to the authority which they hold or the source from whence they derive it. If that principle prevails, what is to be the predicament of things when two or three or a dozen sets of electors all claim the right to vote, and all send up their certificates in apparently proper form, and all are laid before Congress by the President of the Senate?

It will certainly not be denied that Congress may inquire into the *genuineness* of any certificate produced by the President of the Senate. If it is known to be a mere forgery, all men of common integrity will say with one voice that it must not and shall not be counted. That being settled, let us see what follows in the case under consideration.

Forgery is the fraudulent making or alteration of a writing to the prejudice of another's right. If the returning board and Governor of Louisiana willfully, fraudulently, and falsely make a certificate that certain persons therein named had a majority of the popular votes, knowing the fact to be otherwise, they bring themselves literally within this definition. The books on criminal law teach that an indictable forgery is proved when a paper, though signed by the hand of the proper person, and not afterward altered, is brought into contact with any trick or imposture practiced by or upon the maker of it. Thus, a note for a thousand dollars, signed by an illiterate man on the assurance that it binds him to pay only five hundred; a will drawn contrary to instructions and misread to the testator; a deed antedated with the consent of both parties to affect injuriously the rights of others—these are held to be forgeries by all the text writers on criminal law, from Coke to Wharton. The judicial decisions, however, in England and America are not uniform on this point; and I admit the better opinion to be that an indictment for forgery can not be sus-



tained without proof of an actual false making of the paper, in whole or in part, a simulation or counterfeiting, which gives it the appearance of being made by somebody who did not make it. But this latter rule applies only to private papers, and would hardly save the Louisiana conspirators, if indicted for forgery in the fabrication of false election returns. It has never been held that an official certificate, intended for a fraudulent purpose, and known to be false, is not a forgery. An auditor of the Treasury certifies to a balance in favor of a person whom he knows to be not a creditor, but a debtor of the Government, with intent to defraud the public; a justice certifies that a deposition was sworn to before him by a person whom he never saw; the clerk of a court certifies to false naturalization papers. These ought to be, and would be held for forgeries. A commissioner, supervisor, or inspector of election whose duty it is to count the ballots at a particular polling-place fabricates a certificate, signs and returns it in total violation of what he knows to be the truth; how would he fare in a court if indicted for forgery? But suppose the returns to be honestly made to the central authority of the State, where the Governor, secretary, or special board of canvassing officers are required to aggregate the returns, can they make a certificate willfully falsifying the whole result of the election without being guilty of forgery? While I concede that this technical question is not, in the present state of the law, clear enough to justify any dogmatism about it, the conclusion is not unreasonable or presumptuous that the canvassing officers who did this thing, the Governor who participated in it, and all other persons who encouraged or aided them, are within the condemnation which the law pronounces upon forgers. I ought, however, to add that I have not looked at the criminal code of Louisiana. I have taken it for granted that it contains nothing inconsistent with the general principle established in England by the statute of Elizabeth, and adhered to in the other States of this Union.

But this is not important now, and will never become so unless the guilty parties be prosecuted. The question at present is whether a vote known to be false and fraudulent shall be received as a true one. What weight or value shall be given as evidence to papers concocted with a predetermined intent to cheat? If the evidence, which is laid before Congress, that Louisiana voted for Hayes, shall be shown to have its conception, its birth, and its nurture in mere iniquity, what honest man can safely give it entertainment? A fraudulent paper proves nothing; it is a mere nullity, as corrupt in morals and as void in law as any forgery can possibly be.

The conclusiveness of the certificate made in legal form by the proper State authorities is admitted. But that always presupposes the honesty of the act. A judgment of the Supreme Court is conclusive, too; but any justice of the peace who knows it to have been cor-



ruptly obtained may properly cast it aside. The most solemn act of the Executive—a pardon, a patent, or a commission—loses all validity if it be tainted with fraud. Under proof of any dishonest practice any private deed and every private record becomes as worthless as a blank, no matter with what solemnity it may have been executed or how carefully attested. All writings are obliterated, and great seals of State crumble into dust the moment they are brought into contact with a covenous fact. This applies to election returns as well as to everything else.

The principle which fences us against knavery in matters of minor importance will not fail us when an attempt is made to cheat us by wholesale out of the right to be governed by a President of our own choice. It *has* been applied to election certificates in cases precisely analogous to this. Once upon a time the majority in the House of Representatives depended upon the election of members in New Jersey. The Democrats were chosen, but the Whig Governor of the State, tempted by the opportunity which he thought he had of making a bold stroke for his party, dishonestly certified the election of the minority candidates and commissioned them under the broad seal. The commission, if it had any force at all, was conclusive evidence of their right to sit as members until they were unseated upon a regular petition and contest. But it was fraudulent, and therefore void altogether. It was not allowed to prevail for a moment. In Pennsylvania a similar trick was tried in favor of candidates for the Legislature known to be defeated by means of a certificate from the returning officers, pronounced by the Governor, the Secretary of the Commonwealth, and all high authorities to be conclusive. But being known to be a sham and a falsehood, the right claimed under it was resisted to the uttermost. Nobody now believes that it was not rightly and legally treated.

But it may be denied that the action of the Governor and the returning board is fraudulent. That is a matter of fact not yet in shape for full discussion. If the Hayes electors, the Governor, the returning board, and other parties to this transaction can prove that they added up the vote and certified the aggregate results according to the truth as it really was, or as they had reason to believe it, then the Democrats have no case. But if they knew what the result was, and yet willfully falsified it, that is a fraud *per se*. They not only did this, but they greatly aggravated the guilt of the act by founding it on pretenses known to be false in fact and insufficient in law.

It is said that the returning board is not bound to make a mere count of the votes and ascertain what candidates have a majority, but may sit in judgment on the returns from every parish, and certify the majority not as it actually is, but as in their opinion it ought to be. To support this they quote section 3 of the Louisiana election law, which no one can read without seeing that it was passed by a cor-



rupt Legislature to prevent the people of the State from turning out the party then occupying the State offices.

A returning board certainly ought to have judicial or quasi-judicial powers to a certain extent, to correct the blunder of a superintendent, to inquire whether a return from any polling-place is properly authenticated, to ascertain what votes have been cast for any candidate by persons not qualified, and make the proper deduction. This is authority which may certainly be given to State canvassers. But it is not given to the Louisiana board by the section referred to. They assert that it does give them power to disfranchise all the inhabitants of any parish in which there has been "an act of violence, riot, tumult, intimidation, armed disturbance, bribery, or corrupt influence." Their jurisdiction, as they claim it, is that of the highest criminal court, and is to be exercised in ways totally prohibited to all courts. They may try the people of a whole parish at once, and condemn them all on *ex parte* statements, without a hearing or notice, for acts of violence committed by a person unknown to them at any place within their borders, and at any time in the indefinite past. A conviction obtained in this way is immediately followed by a sentence of disfranchisement, which I need not say is the most frightful penalty that can be inflicted on a people struggling to free themselves from the domination of reckless knaves. This terrible jurisdiction to doom and punish may seem to be mitigated by the pardoning power, for the board is authorized to condone the offense when they think it has not "materially changed the result of the election." But no clemency is ever extended to their political opponents. The "result of the election" is always "materially affected" by an act of violence or fraud, no matter when, where, or by whom committed in a Democratic district, but the reverse is sure to be held where the majority is not Democratic.

Will any man in the world say that a power like this may be held and wielded by a returning board consistently with the fundamental law of Louisiana, or any other free State? No; for reasons too numerous to mention. It usurps authority which belongs exclusively to the courts; it imposes the severest punishment, without trial or evidence, upon large bodies of men who are known to be innocent of every offense; in defiance of the State constitution, it refuses the votes of qualified citizens, and makes the right of suffrage a mere mockery. Moreover, it flatly violates that express provision of the Federal Constitution which declares that "no person shall be disfranchised except for rebellion or other crime," which, of course, means a crime of his own whereof he is legally convicted.

Besides that, this law does not apply to the case of presidential electors. It is expressly confined to State, parish, and judicial officers, to members of the Assembly, and members of Congress. There is another and a totally different provision for canvassing and count-



ing the votes for presidential electors, which appears to be in full force.

On the whole case the law and the evidence, which is sure to come through the proper committee, will demonstrate this to be a monstrous, unmitigated, palpable fraud upon Louisiana and upon the whole American people. It is not the vote of the State, nor the product of any State authority legally exercised, but the mere spawn of a criminal conspiracy. It is impossible to see how Congress, or either House of Congress, can, with its eyes open, receive this thing and palm it off on the nation as a genuine vote, without becoming a partaker in the crimes which gave it origin, unless the law teaches a false doctrine when it says that he who knowingly utters a false paper is as guilty as he who makes it.

But it is possible that the judgment of the two Houses upon this subject may differ *toto cælo*. They act, deliberate, and decide independently of each other. Though they sit in the same hall while the votes are counting, they are not fused into one body. Upon any question within the jurisdiction of both, the judgment of one is as potent as the other, and it is equally clear that each must decide for itself how, when, and in what manner the separate duties assigned to it shall be performed.

Now, the Senate may think that this vote is not fraudulent, or it may believe that fraud is, and ought to be, as good and valid as truth, while the House adheres to the opposite notion, and, acting upon its convictions, refuses to sanctify the fraud by adopting it. What then? Does that bring the organic machinery of the Government to a deadlock, so that it can not move without breaking to pieces? Certainly a difference between the two Houses must be followed by that disastrous consequence, if it be true that each has the same power over the whole subject and over every part of it. Let us see if this be the state of the law as the framers of the Constitution made it.

The power to count the votes and decide upon their validity is not given in express words. But it comes by clear implication from the duty of electing a President and Vice-President in case no candidate has a majority of the electors. The subsequent and immediate duty of the House depends upon the state of the electoral vote for President, as the Senate's action must be governed by the vote for Vice-President. The duty to do an act upon a certain contingency certainly implies the power to ascertain whether that contingency has arisen or not. If the Senate thinks it right to admit fraudulent votes, and can find enough of them to elect their candidate, they may install him in the chair of their body, since there is no legal authority in the House of Representatives or elsewhere to stop them. If they, upon examination, believe that a true count of the legal vote gives no one a majority, and thereupon proceed to make an election of their



own between the two highest, the House certainly can not interfere. The House is equally independent when engaged in the performance of the duty separately and specially assigned to it. If no candidate has a majority of all the electoral votes, the Representatives of the people in the Lower House shall make a choice from the three highest. How is this duty to be rightfully performed without ascertaining whether any candidate has a majority, and, if not, who are eligible as the three highest? And by whom shall the fact be ascertained if not by themselves? If the House, upon what it believes to be a true count of the votes, shall determine that no one has a majority, can the Senate interfere and command the House not to elect? Or can it dictate to the House the names of the three persons from whom the choice is to be made? To ask these questions is to answer them. The Senate having nothing to do with the presidential election has no duty to perform about it—can pronounce no judgment upon it that binds anybody. For the same reason the House can not interfere with the business of electing a Vice-President, which the Constitution has confided to the Senate. Each is as far from the control of the other as both are from the control of the Executive.

There is a joint rule of the two Houses, by which they have mutually bound themselves, that neither House shall count a vote for President or Vice-President if the other decides to throw it out. Whether this rule is in force or not makes no practical difference in the present case on the question between Tilden and Hayes. The refusal of the House to count the fraudulent votes, if it does not prevail under the rule, must be made equally effectual under the naked Constitution.

## FORENSIC.

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### ABLEMAN *vs.* BOOTH.—THE UNITED STATES *vs.* BOOTH.

SUPREME COURT OF THE UNITED STATES.

*May it please your Honors :*

THESE two cases may be regarded as one and the same case. They both arise out of the same transaction, and one of them takes it up just at the place where the other drops it. It is some little time since I have carefully looked at the record, but I think I can state the facts of the cases without danger of committing any material error.

It appears that a negro slave absconded from his master in the State of Missouri, and came over into Wisconsin, where he was apprehended under the act of 1850. While he was in the custody of the marshal, he was aided and assisted by Booth, the defendant in error, to escape. For that offense Booth was prosecuted under the seventh section of the act ; arrested, carried before a commissioner, and, refusing to give bail, was committed for trial. After he went into custody under the warrant of commitment, he made application to one of the judges of the Supreme Court of the State of Wisconsin for a writ of *habeas corpus*, which was allowed him. The judge, after hearing the cause at his chambers, delivered a very elaborate opinion, in which he proved, apparently to his own entire satisfaction, that the fugitive slave law was unconstitutional, and that there were certain fatal defects in the warrant of commitment. From these premises he drew the deduction that he had the right to discharge the prisoner, so that he could not be tried by the United States Court.

To this proceeding a *certiorari* was taken by the District Attorney of the United States, and the case was removed into the Supreme Court of the State, in *banc*. There it was heard again. The judge who had already heard the cause adhered to his previous opinion. One of his brethren agreed with him that the law was unconstitutional, but put his opinion upon grounds somewhat different. The other judge concurred in affirming the order of discharge for the supposed



defects in the form of the warrant. The prisoner was therefore finally discharged, so far as that proceeding went.

Nevertheless, at the next term of the District Court of the United States, a true bill was found by the grand jury, and upon that indictment a bench warrant was issued by the judge, on which he was apprehended to await his trial at the next succeeding term. He made application again for another *habeas corpus* to the Supreme Court of Wisconsin. They refused to allow the writ, on the very sensible ground—sensible, I mean, when considered with reference to what the same court did before and afterward—that they had no authority over the matter, and that the District Court had all authority. He was tried; his guilt was proved; he was convicted; a motion was made for a new trial, which was refused; he moved in arrest of judgment, and that also was overruled; he was sentenced—sentenced moderately—to a fine of two hundred dollars, and ten days' imprisonment in the common jail.

Immediately after he went into the custody of the marshal in execution of this sentence, he made a third application to the Supreme Court of the State for another *habeas corpus*, which was allowed him, and they heard the cause again. But then it was heard *ex parte*. The District Attorney supposed that he had done his whole duty when he had followed the prisoner until he saw him convicted by a jury, and in custody under the sentence of a court having exclusive jurisdiction of the offense. But the case was argued at length by the counsel for the prisoner, and, after that, it was taken up by the judges and argued by them at still greater length on the same side. The same differences of opinion manifested themselves then, which had existed before, on the constitutional question. The third judge, who had previously dissented from the other two, dissented again, holding that the Fugitive Slave Law was constitutional enough. But it seems not to have entered the head of any judge on the bench that the question was already settled. That the District Court, the tribunal to which Congress had referred the whole case for decision, was entitled even to a voice in the matter, was a proposition which no one thought of unless to deride it.

There was another subject upon which they were unanimous, and that was, that if they could find any defect in the pleadings—if the offense was not set forth in the indictment with the legal precision which the statute required, *according to their construction* of the statute—then also they might reverse the judgment of the District Court, and enlarge the prisoner. Thereupon each judge drew as fine a sight as he possibly could upon the indictment, and each one saw, or thought he saw, some defect in it. Upon these grounds they discharged the convict, who goes unpunished at this hour. He has, besides, the implied assurance of the Supreme Court that if he pleases to commit the same offense again, they will use all their power to screen him from justice.



When these writs of error were taken, the judges refused to obey them, and directed their clerk not even to give us a copy. But we had copies before, and upon them the cases were docketed, as your honors remember.

Before I proceed to consider what may be called the legal merits—or rather the demerits—of these cases, I desire to call the attention of the court (but only for a moment) to the manner in which they come here. I have not a doubt that the filing of a record attested as this is will give your honors complete and ample jurisdiction to revise the proceedings and to reverse or affirm the judgment as you may see fit. I am equally well satisfied that my predecessor's conduct was governed by good and wise reasons. Nor do I think that any other course ought to have been taken by this court itself *ex mero motu*. But what I do fear is, that this case, taken in connection with that of *Worcester vs. The State of Georgia*, may be regarded as authority for a principle which I am very sure neither of them was intended to cover. The inference may be that this court considers itself as being powerless to enforce obedience to a writ of error addressed to a State court. This, of course, is untrue, and might lead to serious trouble. It might happen—it is almost a wonder that it did not happen in this case—that nothing but a regular return will bring the record here.

Most assuredly, if this court is authorized to issue a writ of error, as by the Constitution of the United States and the act of 1789 it is, to a State tribunal of the last resort, that authority must be coupled with the power to enforce obedience. It is no law unless it has a sanction, as Mr. Justice McLean said in *Robinson's case*. How, then, is the duty imposed by the command of this court upon the judges of a State court, to be enforced? I answer, by proceedings against them as for a contempt. That is the mode of enforcing obedience to all process of every court, except in cases otherwise specially provided for by statute. Against whom is the proceeding to be directed? Not against the clerk, who is merely the hand of the judges, but against the judges themselves, to whom the writ of error is directed, who can not shift the sin of disobeying it on their servant, nor atone for their offense by a punishment inflicted on him.

In the practice of that State with whose code of procedure I am most familiar, it has often happened that rules have been made in the Supreme Court upon judges of the Common Pleas to show cause why attachments should not issue against them. I speak what I do know when I say that, in every case where a rule was taken, the proceeding would have ended in the conviction of the judges, if some good defense had not been made. In one of the recent English reports—the fourth volume of the "*Jurist*"—where Baron Alderson was ruled to show cause why an attachment should not issue against him for a similar offense, he made an explanation which showed that he was not in



contempt, and therefore the matter was dropped. But it was not dropped because the court that issued the writ of error did not think they had the power to imprison him if he had finally and willfully refused to perform his duty. The general rule is also laid down in the Institutes. In the very remarkable controversy that took place in New York between Lansing and Yates—or one of the branches of that case—the Court of Errors and Appeals took the same course with the judges of the Supreme Court.

JUDGE NELSON.—That is the acknowledged practice in New York.

ATTORNEY-GENERAL BLACK.—It is so in Pennsylvania; it is so everywhere. All authority is for it. There is no authority nor no practice against it. The reason of the thing and all the analogies of the law are in favor of it.

For these reasons, I hope that your honors will cause it to be understood, as clearly and distinctly as possible, that these judges, in refusing to send up their record, violated a plain obligation imposed upon them by the Constitution of the United States, which they were sworn to support; that in that refusal they were guilty of a contempt of this court; that such a contempt is a high crime against the administration of justice; and that these men owe their impunity, not to any weakness, or supposed weakness, of this tribunal, but to the magnanimity of the Government in forbearing to ask for punishment.

Passing from that, let us look at the record itself.

I desire to speak as respectfully as possible of "all who are placed over us." I know that it is the religious duty of every Christian man, and the political duty of every good citizen, not "to speak evil of dignities." But I would be withholding from this court what I most devoutly believe to be the truth, if I did not say that the whole of these proceedings in the State Court of Wisconsin are, from beginning to end, a mere tissue of legal absurdities. I say this "more in sorrow than in anger"; for two of the judges, constituting a majority of the court, have discussed the case in terms of decency and moderation. Of the other judge I have nothing to say one way or the other. If you will take the trouble to read his voluminous opinions in these cases you will know as much about him as I do.

The legal point that was decided in one of these cases is just this, stated as shortly as possible—of course, I make the statement in my own words: *That where an offender against the laws of the United States is on his trial, the court which alone has power to try him shall not be permitted to determine whether the law that defines the offense is constitutional or not; nor to give the construction of it; nor to decide whether the offense is sufficiently set out upon its own record; but after conviction and after judgment all these questions remain open to further inquiry, and may be readjudicated by any State judge who is invested by a State law with the general authority to issue writs of*



*habeas corpus*. That is the proposition decided in one of these cases. In the other, it is held : *That a party charged with an offense against the laws of the Union, and in custody of the Federal officers awaiting his trial, may be taken out by habeas corpus and discharged without trial, by any State judge who has self-complacency enough to think he understands the law and the Constitution better than the tribunal whom Congress and the framers of the Constitution have charged with the duty of deciding upon them.* If I were required to make one head-note for both the cases, it would be this : *That the habeas corpus in the hands of a State judge may be used against the Federal tribunals as a Writ of Prohibition before judgment, and a Writ of Error after judgment.*

This claim is not based by the Wisconsin court upon any appellate jurisdiction which they supposed themselves to have. They admit that no authority is given them by any law, either of the State or of the United States, to review the proceedings of a Federal court. They do not assert even a right to try the party themselves. They merely say that no Federal court can have jurisdiction in any case where it has committed or is likely to commit an error. Being without jurisdiction, its proceedings are null and void. They have a right to determine what is an error and what is not. It follows from these premises that no Federal court which presumes to differ from them, either on a profound question of constitutional law or on a sharp point of special pleading, can exercise the authority given to it by the Constitution and laws of the Union. Upon this principle it is manifest that the laws of the United States can never be executed except by the grace and favor of the State courts, and such grace is never to be given when they disagree in opinion.

You have *no jurisdiction* when the State judges think you exercise it erroneously. No jurisdiction ! One blast upon that ram's horn and the whole structure of judicial authority built up by this Government comes tumbling about our ears like the walls of Jericho.

The Constitution declares that the Federal courts shall try all offenses against the laws of the United States ; and Congress has given exclusive jurisdiction of Booth's offense to the District Court. No law, State or national, has authorized the Supreme Court of Wisconsin to intermeddle with the business in any one way or another. Yet the latter court asserts its own jurisdiction and denies that of the Federal tribunal. The logic by which the judges bring about this strange *bouleversement* of the law is curious to look at. The first thing they do is to assume that their opinion is conclusive—"the end all and the be all" of the whole matter. Next they decide that the District Court is without authority, and its judgment a nullity. Thence they come back, as the surveyors would say, to the place of beginning, and conclude that inasmuch as the Federal court has no power they



themselves have all power. Their language to the Federal judge is substantially this : " We admit that the validity of our judgment depends on yours being void, but yours is void because ours is valid ; and when we pronounced our valid judgment, we said yours was void." Logicians have told us that reasoning in a circle proves nothing. But here it has been used as a means of proving what could not possibly be proved in any other way.

If this power were conceded to the State courts, it would never be grossly abused by any judge who acknowledges the principle of *stare decisis*. But in this case all authority was trampled under foot. That public wisdom which, in every country, is made the rule of civil conduct for the very purpose of supplying the deficiencies of individual judgment, is treated with contempt, and in its place is substituted a mere private notion, which each judge carries about in his own breast. No matter whether he got it from a stump-speech or a partisan newspaper, or whether it be an original crotchet of his own brain, if it be his own, either by adoption or birth, that fact alone immediately consecrates it and makes it the supreme law of the land, so far as he has anything to do with the administration of it. The evil effect of departing from the settled law, and putting up private opinion as a standard of decision, was never so palpable as it is in this case. Here was a rule of constitutional interpretation, acted on by the Father of his Country, and by all his successors ; approved by the second Congress that assembled under the Constitution and by every succeeding Congress ; affirmed directly or indirectly by every judge that ever sat on this bench, and by all the Federal judges of the country ; approved, moreover, by every State court (except that of Wisconsin) in which it was ever questioned ; and all the people have said " so be it." This rule, so sanctioned, so approved, so sustained by every branch of the Government, and by all classes of people—this is the rule, which the court below repudiated. Why, it will stand the test of orthodoxy which St. Augustine applied to the creed of the church—*quod semper, quod ubique, quod ab omnibus creditum est*. Whosoever opposes his sole opinion to such an article in the judicial faith of the country, must needs be a promoter of heresy, disorder, and schism to the whole extent that his power can go. We are in the habit of speaking about legal authorities under the figure of a stream. When they are numerous, decisive, and strong, we call it a current. There is no current of authority here, but a torrent, rolling forward impetuously as the waters of the Niagara River, and pressed from behind by all the waters of the lake. And here stand one or two men on the shore who try to roll it back by throwing their handful of sand in it. But the mighty torrent still thunders onward.

*Labitur et labetur in omne volubilis avum.*



Still, perhaps everywhere, except in Wisconsin, we might manage to get on in some sort of fashion if this power were confined to the Supreme and Superior Courts—to those who occupy the highest posts in the State judiciary. But it is claimed as a mere incident to the law of *habeas corpus*, and, therefore, any judge who can issue a *habeas corpus* can do everything that was done by the Supreme Court of Wisconsin. In most of the Western States the power of issuing such writs is given to the probate judges, whose most important business it is to settle administration accounts, and who may, or may not, be fit even for that. In other States this power is wielded by the associate judges of the Common Pleas, whose general duty it is to sit beside the president during term-time, and do nothing at all. They are almost universally respectable men in their way, but nobody supposes that any great amount of legal talent is wasted upon that office. Your honors see very well, that, according to the Wisconsin doctrine, the highest, and the most elevated, and the most learned of the Federal judges is completely subordinated to the lowest, the most prejudiced, and the least educated of all the State judges, and that, too, on questions of national law. A judge appointed by the proper organs of the national Government, responsible to the public opinion of the whole nation, triable before the representatives of all the States for any offense he may commit in office—he is placed in total subjection to some other judge, who owes no responsibility to anything but the popular sentiment of a single county. If this were acted on but a little while, our judicial system would acquire a mode of progression like nothing I ever heard of, except Cotton Mather's snake—a very curious specimen of natural history, which, he said, he discovered in Massachusetts, and which he described as “a serpent which goeth one while with its head foremost, and one while with its tail foremost.”

Suppose one of your honors to be sitting in the Circuit Court and trying a party accused of some grave crime against the laws of the United States—piracy, murder upon the high seas, the offense of importing captured Africans into the United States or exporting stolen slaves into Canada—it matters not what you suppose it to be. In the course of the trial the constitutional validity of a statute is denied, its construction is doubted, or the correctness of the pleading under it is impugned. You are not to decide these questions. It is not worth while for the counsel to argue the case to you; but if there should happen to be, among the spectators in a corner of the courthouse, a probate judge of the county, let them address him; for he is the judge of last resort. You need not charge the jury. The verdict, if it be a verdict of guilty, will not stand a moment before the omnipotence of a *habeas corpus*. Charge the judge in the corner; for if you do not convince him, he will mount his *habeas corpus* and charge



down upon you. And he is an adversary that you can not possibly cope with. One blow from him will knock your proceedings all to pieces. One word of his will paralyze your power. If he but breathes upon your judgment he melts it into nothing. Even if you convince him, perhaps you have not done the tithe of the work you have yet to do. There may be a score of other judges in the neighborhood having just as much power over your judgment as he has, and if you do not get all of them you may as well have none. How are you to get them? Will you call them together and make a general speech? or will you canvass them separately? Their "most sweet voices" you must have in your favor, or else the execution of the Federal laws will become impossible.

The very reverse of this is as necessary to the administration of justice in the State as in the Federal courts. Imagine two State courts to be sitting side by side, each invested with its own exclusive jurisdiction over different classes of subjects, but all the judges of both having power to issue writs of *habeas corpus*. Shall a single judge of one discharge the prisoners and set aside the judgments of the other? They may on the principles laid down in this case. Nay, it is but carrying the doctrine to its consequences to say that, where a criminal court consists of three, four, or five judges, one of them, who dissents from the rest on a question of law, may wait till the term is over, bring the convict out from the penitentiary, and discharge him, on *habeas corpus*, despite the majority.

This notion that a judge who hears a case on *habeas corpus* is not restricted to his own proper jurisdiction, is a growth of the last ten years. Within that time great men at the bar have seemed to believe it sound; and now and then a judge has been found who eagerly grasped at the opportunity of doing by *habeas corpus* what the law forbade him to do in any other way. Six or seven years ago, a man who was arrested in Ohio, for embezzling public money in California, was taken out of the hands of the Federal authorities by a State judge, and to this day he runs at large unwhipped of justice. It was a grievous outrage on the authority of this Government, and it ought to have been condignly punished. Some time afterward a marshal in Ohio, who had a prisoner in his custody under process of the Circuit Court, was served with a *habeas corpus* commanding him to bring that same prisoner before a State judge. The marshal could not obey the *habeas corpus* without disobeying the other process, which he knew to be legally binding. The next place he found himself was in the custody of a sheriff, and he was on the point of being sent to jail for doing his duty, when Mr. Justice McLean threw the shield of his protection over him and pronounced all the proceedings of the State judge to be entirely void. In 1857 it seemed as if a civil war was about to break forth in Ohio, by reason of an effort which the State officers made to



thrust themselves between the Federal authorities and certain persons who had committed crimes against the United States. The history of this transaction is known to the court. It is also known how the Ohio Legislature has virtually abolished the old writ of *habeas corpus*—the writ made sacred and perpetual by the solemn words of the Constitution—and supplied another thing, which serves as a mere excuse to rescue and re-capture prisoners who are detained in lawful custody. But no Supreme Court—no court of any kind, whose opinions are thought by itself to be worth reporting—has taken the ground on which the Wisconsin court planted itself in this case.

All laws made for the general welfare of a country so large as ours, and for the protection of rights so diversified, must necessarily encounter some local unpopularity. It was always so from the origin of the Government. But in the earlier and better days of the Republic, this mode of opposing them was not thought of. In 1796 the excise duty on distilled spirits was believed in Western Pennsylvania to be not only oppressive but unconstitutional. But the men of that day threw themselves back on the moral right of revolution, and opposed the obnoxious law with arms in their hands. They never dreamed of carrying on the "Whisky War" by firing off writs of *habeas corpus* at the Federal authorities. Two years afterward there was a strongly-marked division of sentiment on the constitutional validity of the Sedition Law. There was but one man in the country who thought of asking relief at the hands of a State judge. The precedent was not thought a fit one to be followed, and Mr. Sergeant's research alone has saved it from total oblivion. Callender and Lyon and Cooper served out their time, and paid their fines, or waited the advent of a new Administration. At a later period, when nullification arose in South Carolina, the people of that State assembled in convention, and abrogated the tariff act by a solemn Ordinance. This, according to their theory, wiped it from the statute-book as completely as if it had been repealed by Congress. Then they authorized resistance to it, and judges might oppose it by *habeas corpus* and *homine replegiando* on the same principle that a private citizen could oppose it with pike and gun. We all remember the great debate in the Senate on this subject. Mr. Webster won his victory, so far as it was a triumph of logic and of law, by pressing this very point upon his adversary. "How," said he, "will you release yourselves from the grasp of the Federal judiciary?" But the victory would have been on the other side, if General Hayne could have answered that the State judges had a right to take every case into their own keeping by means of the *habeas corpus*. He could not say so; he was too wise a man to believe it, and too honest to say what he did not know to be true. President Jackson, in his proclamation, used the same unanswerable argument. The truth is, that the exclusive authority of the Federal judges to



decide all cases arising under the Federal laws was the lion in the path of nullification. It saved the country from dismemberment then, and no one knows the day nor the hour when it may be necessary to invoke it again for the same purpose. When it ceases to be maintained, the Union of the States will become a rope of sand.

The highest tribunals of the States (that of Wisconsin always excepted) have uniformly refused to adopt this wild notion of their power over the Federal laws. It was distinctly repudiated by the Supreme Court of Massachusetts, in Simms's case; by that of New York, in Prime's case; and by that of Pennsylvania, in Williamson's case. It had been exploded long before by Judge Cheves, of South Carolina, in an opinion of singular brevity, clearness, and force.

But there is one authority on this subject, to which I beg your special attention. What I refer to is an act of the Wisconsin Legislature, in which the judges of that State are plainly, expressly, and unequivocally forbidden to do the very things which were done in both these cases. The statute declares that no *habeas corpus* shall be allowed to any person who is detained in custody under process issued by a Federal court or judge having exclusive jurisdiction of the offense therein charged, nor shall such writ be allowed to one who is detained under the final sentence or judgment of *any* court of competent jurisdiction.

MR. JUSTICE GRIER.—Was that statute in force at the time of this decision? Perhaps it was enacted since.

ATTORNEY-GENERAL BLACK.—It was in full force at the time. The decision of the court was in flat opposition to it. The judges saw it, met it full in the face, quoted it, and did not pretend to misunderstand it. They knew it to be as perfect a prohibition as the Legislature could make of their whole proceeding. Will your honors believe me, when I tell you what reason they gave for disregarding it? They said it was unconstitutional! They not only asserted their own authority to resist the execution of Federal laws, and set aside the judgment of a Federal court, but they denied the power of their own Legislature to confine them within the sphere of their proper duties.

I suppose I have said enough to show that, whatever the law upon the subject may be, the Supreme Court of Wisconsin is decidedly *not* the place to look for a sound exposition of it. I submit that the propositions of the brief are true, and sustained by the authorities cited. I shall refer to them severally.

I. *The judges were guilty of a criminal contempt in refusing to send up their record.* On this I have nothing further to say beyond a reference to the books. (2 Coke Inst., 425-27; 4 Jurist, 190; Act 1789, sec. 17; Act 2, March, 1831.)

II. *The act of 1850 for the extradition of fugitives from labor is constitutional, binding, and valid.* This has been denied on three grounds: 1. Congress had no power to legislate on the subject. 2. There is no provision for the trial of a fugitive by jury. 3. Commissioners are part of the machinery to be employed in executing it. The two first of these points have been so often decided here and elsewhere that this court, on several recent occasions, have admonished counsel that they were no longer regarded as open to argument. The third is equally well settled; but at first blush it has something about it a little more plausible. The argument on the wrong side is this: The judicial power of the United States is given by the Constitution to the Supreme and other courts, of which the judges shall be appointed in a certain way, and hold their commissions during good behavior. Commissioners exercise judicial functions, and are therefore judges. But they are not appointed in the way prescribed by the Constitution for the appointment of judges, nor do they hold their offices during good behavior. The vice of this argument consists in the assumption that commissioners are judges merely because they sometimes exercise powers which the judges themselves might exercise without them. A judge may commit to prison, take a recognizance of bail, administer an oath, investigate the facts of a cause, and deliver into the proper custody a fugitive from justice or labor. But it does not follow from this that he may not delegate the power to a clerk, examiner, master in chancery, auditor, commissioner, or other assessor. These are but servants of the court, not judges. Their decisions can determine no ultimate right, and are never conclusive either upon the court which appoints them or any other.

The same rule of constitutional interpretation which forbids the courts to appoint officers necessary for them, would require Congress to exercise directly all legislative power. Then Congress must sit every day as a town council for Washington and Georgetown. The executive power being given to the President, he must collect all the revenues and pay them out in his proper person; command the army and navy without the aid of subordinates; defend the country by his individual prowess; and put down every insurrection with his own right hand.

But this *reductio ad absurdum* was hardly needed, for the cases I refer to are more than enough to put every constitutional objection to the act of 1850 at rest forever. (5 How., 230; 14 How., 13; 16 Barb., 268; 7 Cush., 285; 5 McL., 469; 2 Pick., 11; 5 S. & R., 62; 12 Wend., 311; 4 W. C. C. R., 327; 16 Peters, 539; 1 Bald., 571; 3 Liv. Law Mag., 386; 18 How., 972.)

III. *But the judgment of the District Court, even if it had been erroneous, was absolutely conclusive.* Being a court not only of compe-



tent but of exclusive jurisdiction, no question of law or fact which was or might have been raised on the trial can afterward be examined either directly or collaterally between the same parties in another court. Here was an offender against the United States who entertained some new and curious views of the statute which defined his crime. He says the Constitution protects him from the operation of such a law; by his construction of it he is not within its meaning; and (what is worse than all) there is a flaw in the indictment. On these acute propositions he bases his claim to impunity, and his proper judge, whoever that may be, must determine whether his defense is false or true. Who is his proper judge? The Constitution and laws of the United States declare the sole authority over the subject-matter to be in the District Court, and that court pronounces his defense unsound in law. Thereupon he appeals by *habeas corpus* to another court, which all law, both State and national, has forbidden to take cognizance of the matter; and this latter court, in defiance of the prohibition, not only re-examines the cause, but enlarges the convict and sends him abroad to commit the same offense again.

The rule of law which made the judgment of the District Court conclusive in this case upon all the points which were here re-examined in the State court, is so clearly defined, so universally acknowledged, so well settled, so necessary, and so wise, that if I had not seen this record, I should have been willing to affirm that no judge in America had ever denied or ever would deny it. It is laid down in all the horn-books of the law; and I make some citations merely to show how strangely the authorities have been overlooked: (Dutchess of Kingston's case, St. Trials, 2 Smith's Leading Cases—note; 5 C. B. Rep., 418; 14 Q. B. R., 566; 6 Q. B. R., 666; 57 Eng. C. L. R. 216; Cro. Car., 168; 1 Barb., 240; 26 Penn. St. Rep., 9; Stat. of Wis., Hab. Corp.; 1 Curtis Com., 155-'56-'57; Serg. Con. Law, 277; 1 Kent, 319 and 419; 2 Story on Const., sec. 1756-'57; "Federalist," Nos. 30 and 81; Rhodes's case cited, Searg't, 284; 2 Wal., Jr., 536.)

IV. *When a party accused or convicted of an offense against the United States is in the custody of the proper Federal officers, all process issued by State judges to take him out of such custody is void, and the Federal officers may lawfully disregard it.* Surely, when a judge or other officer of the United States is engaged in a duty confided to him by the Constitution and laws, another judge who is wholly destitute of jurisdiction can not thrust himself into the business. No country in the civilized world permits the administration of justice to be baffled and obstructed in that way. All process intended for that purpose, or calculated to have that effect, must necessarily be void. When a Federal officer is commanded by his own court to do one thing, and a State judge commands him to do another, he can not obey both.

It admits of no doubt that in such a case he is bound to execute the process which is legal, until he is prevented by physical force. There may be cases in which it would be prudent to yield the right rather than provoke a collision and excite the passions which such a collision would kindle. But it is not the point of prudence which you are called on to decide; it is the question of law. What is the legal right and duty of an officer so situated? Your answer, I confidently trust, will be that he is bound to execute the legal writ, if it be possible; that he must not voluntarily abandon his duty; that the mere service of a bogus writ upon him is no excuse for surrendering a prisoner whom he is required to keep safely. If the prisoner be forcibly taken out of his hands, that is another thing. That is a rescue; and all concerned in it (including the judge who ordered it) may be dealt with accordingly.

I claim nothing for the Federal courts which is not habitually conceded to the State courts. Both are equally independent in their respective spheres. Every judicial officer, acting within his jurisdiction, is an organ of the law, and the highest can not irregularly interfere with the lowest. A justice of the peace is entitled to as much respect as the Chief-Justice of the United States. Of course, I do not mean that involuntary homage which we all pay to the highest intellect combined with the purest integrity, but the *legal* obedience which is due to every judge who confines himself to the duty assigned him by the law. When a valid and binding command is issued by a court of competent jurisdiction to its own officer, a conflicting order issued by another court which has no jurisdiction at all must be void. This is true of courts established and maintained by the same government. It is, if possible, more emphatically true of tribunals differently appointed, administering a different code, and responsible to a different government. (1 Mod., 119; 3 Pet., 202; 2 Hale Cr. Pl., 144; 10 Petersdorf Abr., 287; 2 Inst., 615; 57 Eng. C. L. R., 418; 2 Ld. Raym., 1110; 5 Binn., 514; Searg. Con. Law, 284; 10 Rep., 76; 15 Johns., 152; 9 Texas, 319; 6 Fost., 239; 5 Barb., 276.)

V. *When an officer is doing his duty in obedience to the legal process of the court to which he belongs, and an attempt is made by another court to punish him for so doing, he is entitled to such summary measures as may be necessary for his protection.* This is true at common law and by universal custom. Suitors, jurors, witnesses, and officers whose service or attendance is necessary to the administration of justice in one court, must be free, while so engaged, from the process of other courts. If a Federal officer can not serve a writ or execute a sentence without being arrested by a State court for doing so, the judicial authority of this Government will come to an end very soon.



But I need not argue this on original principles. The act of 1833 distinctly provides for the immediate and summary discharge of any Federal officer *so* arrested, whether on civil or criminal process. In Robinson's case, Mr. Justice McLean discharged his marshal with a stern rebuke to those who had detained him from performing his duty. In Jenkins's case, Mr. Justice Grier decided that the *capias* on which the deputy marshal had been arrested for the offense of serving process of the Circuit Court, was wholly void.

MR. JUSTICE GRIER.—The officer was arrested in that case on a criminal proceeding. There was an indictment found.

ATTORNEY-GENERAL BLACK.—The case, then, is stronger than I supposed. In addition, I will give you a reference to the act of March 2, 1833; Jenkins's case, 2 Wall., Jr., 521; *Ex Part. Robinson*, 3 Liv. Law Mag., 386.

When these proceedings shall receive the solemn condemnation of this court, the proper means will be adopted to vindicate the law by rearresting the convict who was enlarged by them.

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FOSSATT *vs.* THE UNITED STATES (RANCHO DE LOS CAPITANCILLOS).

SUPREME COURT OF THE UNITED STATES.

*May it please your Honors:*

THERE is nothing really in this case which gives me the slightest embarrassment; but certain occurrences outside of it have caused me some uneasiness. I know very well that the best way to deal with such matters is to say as little about them as possible, and therefore I shall not complain—at least not now.

Before the cause was opened, the counsel of the claimant, of Berreyesa, of Castellero, and of Foster, all came to the conclusion that the United States, having filed no exceptions in the court below, and taken no appeal from the decree, were not entitled to be heard here; certainly not for the purpose which they avowed of reversing the decree. This opinion was of course strengthened when the Attorney-General, in reply to a question from the Bench, said that he did not know whether he was appellant or appellee. When a gentleman of his acuteness, long experience, and great legal attainments, declares that he is ignorant which side of a cause he is on, the inference becomes irresistible that he is not on any side at all. We regarded it as a duty, which we owed not less to the court than to ourselves and our clients, to make this state of things known, so that the argument could proceed regularly and properly as in other cases, and the real contest between the real parties be discussed by those who truly represented them.

But the court decided to hear the two gentlemen who professed to represent the United States, and they obtained the floor. They have used the privilege, and one of them, to my thinking, has abused it. He has declared this claim to be a scheme, a trick, a fraud upon the just rights of the United States; a mere evasion of the law. The Attorney-General, by virtue of his office, stands at the head of the American Bar; and the present occupant of that place, by his high character as a gentleman and a lawyer, deserves to stand there. What is said by him, or by his assistant with his apparent sanction, may fairly be taken as the words of truth and soberness. When a party is thus denounced from such a quarter, no judge who hears it can be blamed for feeling toward him a strong sentiment of dislike and hatred. You would almost necessarily suppose that there must be at least some little truth in it; some slight foundation for it. But I take leave to declare, that there is nothing in this record or out of it which, in the remotest manner, excuses such a charge. In the whole course of this struggle which has now lasted for more than twelve years, I have never before heard the honesty of the claim doubted, or the integrity of its holders impugned. Their worst enemies have always admitted that they pressed their claim because they believed it to be sound and right. They had everything to inspire them with faith in it. Here was a grant which all admitted to be genuine; for land within boundaries plainly and clearly described. They saw survey after survey made according to the claim of the grantee; witness after witness swearing that the survey was right; decree after decree pronounced by all the judicial tribunals having cognizance of the subject; and finally they saw this very Attorney-General placing his solemn admission on the record, that the United States had no objection to it. Why should they not have faith in such a title, so proved and so admitted? They had faith and they showed it by their works; for they took the title at a larger price (more millions of dollars paid down in solid gold) than was ever before given for a similar quantity of unimproved land. The Attorney-General can find no justification for the charge of his assistant—no excuse whatever—not even the low example of a venal pamphleteer, a scurrilous newspaper, or the meanest retailer of false and petty scandals.

We are here asking for legal justice; and that we expect to get, neither more nor less, for we are in a court where the scales are held with an even hand. We are not begging favors, but demanding a right. If we do not show our right, let our claim be rejected.

In the supplemental brief filed by us are nine several propositions of law, to three of which I now call the special attention of the court. They are these:

1. That the United States are estopped to deny the correctness of the survey by the decree of 1858.



2. That the United States, having made no objections to the survey when it was brought into the District Court under the act of 1860, have no right to make objections here.

3. That the United States, having taken no appeal from the decree now under revision, have no right to be here, for the purpose of reversing, changing, or in any manner modifying it.

If these propositions be true, it follows irresistibly that the United States are here attempting to reverse the decree, without authority or right. Are they not true? Who can deny them? Who has denied them? Vital as they are to the case, clearly as they define the position of the Government to the whole subject, they are passed over by both the Attorney-General and his assistant in dead silence. You heard no logic from the former, no declamation from the latter, on either of the points. They know them to be incontestable and true. If they are true, then the United States can not come into this cause, as they have come, without walking over the slain body of the law.

But these gentlemen have two points of their own; one of them is stated by the Attorney-General, and the other by his assistant, and they are in direct conflict with one another. Mr. Wills thinks that all the proceedings in the court below are *coram non judice*, being unauthorized by the act of 1860, and should consequently be set aside. That would leave us with the decree of 1858, and a survey under it, just where we want it. Of course, nothing could suit our interests better. But fidelity to my own convictions makes it necessary for me to declare that I do not believe the law to be so. Mr. Bates, on the other hand, considers the proceeding in the District Court, under the act of 1860, as being sufficiently authorized, but *expresses his doubt* whether an appeal lies to this court. If he can make that doubt prevail, then this decree, from which we have appealed, is to stand, and the disputed property goes to Berreyesa. Upon his hypothesis, one private party gets the mine; upon that of his assistant, the other is successful; but in neither case can the United States be the gainer.

But Mr. Bates is wholly wrong. When a doubt exists about the right of a citizen to appeal, that doubt is always to be resolved in favor of the right. The right of appeal to the highest judicial tribunal of the country is a sacred right, like that of trial by jury in a common law case, which is never denied upon doubtful construction. Here it is not even doubtful. The law expressly declares that no appeal shall be taken after six months. Does not that imply that an appeal taken before the expiration of six months is valid and good? The constant, universal, and unhesitating construction given to the law by the District Court, by all the profession in California, by all the counselors practicing in this court, and by this court itself, is sufficient certainly to overbalance a mere doubt thrown by the Attorney-General into the other side of the scale. When he comes to consider



how he himself, the chief law-officer of the Government, and the department over which he presides, have treated this law, I think that even his doubt will vanish. He has taken appeals, perhaps a hundred, from cases precisely like this. Thousands of men interested in those cases have been compelled to follow them here as appellees. Many of them, to my certain knowledge, have besought the Attorney-General almost on bended knees, to relieve them from the delay, the expense, and the harassing vexation to which his appeals were exposing them; and he held them tight under this same law which he now says gave him no right to appeal. He has brought parties into this court under this law, and has prosecuted and pressed his appeals here, and, for aught I know, has procured the reversal of many. That he, of all men, should now deny the right of appeal, is a most ungracious thing. It is still worse that he should deny it in this particular case, where he has no interest, and where the effect of his denial, if sustained by the court, would be merely to establish a division-line between the private proprietors, which line he himself, in his brief and his speech, denounces as wrong and unjust.

I suppose it is expected of me that I should reply to the arguments made by the United States, as well as by the other parties. Perhaps it is my duty to my clients and to the court, not simply to take my stand upon the decrees already passed, but to go further, and show that those decrees are right. Though I did not anticipate this duty to be cast upon me, I am ready and willing to meet it.

If the case were now before the court just as it stood before the Land Commission, if no admission had ever been made by either party, and there had been no adjudication by any court; if it were open in all respects to be considered upon its original merits—then only one question of law could be raised in it; and that one question is whether the judicial authorities of the country, in ascertaining the location and boundaries of private land, are to be governed by the calls of the grant, or whether the lines as described in the title-papers, are to be altogether set at naught and disregarded. That, I say, is the one question of law; and it is really no question at all. I think, too, we all are agreed on that. Certainly the claimant does not ask of this court one foot of land that he does not suppose to be covered by his title. The representatives of Berreyesa make their claim upon the same principle exactly; and I am glad to know that Mr. Bates is of the same opinion. All parties here agree that by the calls of the grant we must stand or fall; and certainly it is the law of the land. To change a man's boundary, is to take away a portion of his property and give it to some one else who is not the owner of it, or take it from a private citizen and hand it to the public without just compensation. If you can do this with a part of a man's property, you may take the whole upon the same principle. Then all security to every



man's rights is gone, and everything is reduced to what Bob Roy called—

“The good old rule,  
The simple plan,  
That he shall take who has the power,  
And he shall keep who can.”

But that is certainly a sentiment which sounds better in the mouth of a Scotch robber than it would in the opinion of an American judge.

Then, by the admission of all parties (including the United States, who are not parties), we must follow the calls of the grant. It is our right to have the lines of our land established as the title-papers describe them to be.

Mr. BATES.—Clearly. I agree to that.

Mr. BLACK.—Now, we have a grant in which the lines are described. It is a grant of certain lands bounded by certain natural objects. I have not heard that denied. The boundaries that are described in the grant are capable of being ascertained and run upon the ground. That is not only true as matter of fact, but it is undeniable as matter of law. If the boundaries, as described in the grant itself, are so obscure that they can not be found anywhere on the surface of the earth, then we have no grant at all, no title of any kind; because the grant in that case would be void for uncertainty. If it had been true, it would have been an insuperable objection to the validity of the title, and our claim never could have been confirmed. But the United States have many times admitted, and it has often been adjudicated, that this grant was a good and valid grant. That admission includes the admission that we have a grant of land by certain boundaries. Besides all that, when the case was in this court the first time, your honors, by the mouth of Judge Campbell, unanimously declared that the land granted to Justo Larios had boundaries on three sides, which were well defined by objects upon the ground, and that the fourth line was capable of being ascertained as fully as either of the other three by the simple process of a survey.

Then we have a tract of land for which we have a good title, bounded by lines which may be located upon the ground. It remains only that we ascertain where those boundaries are. This can not be a difficult task. It is but looking at the calls of the grant, and then looking at the topography of the ground upon which the grant is to be placed; apply the one to the other, and the thing is done. Anybody that can read may see the calls of the grant. There can be no trouble about that. But how the objects called for stand upon the ground is to be ascertained by an examination of the evidence which is scattered through a record of five hundred and fifty pages. That may require some attention and study, but, being carefully examined,

you will reach a perfectly clear conclusion, for the evidence is not in the least contradictory. Indeed, this is a subject upon which you would not expect the witnesses to be in conflict with one another. To swear away the hills and the mountains and the streams is a task that perjury would scarcely undertake, and certainly would not accomplish; for if one individual should make a misrepresentation of such a fact, he would be put to open and manifest shame by the production of twenty others, who would contradict him by proving the truth. Every fact, upon which we rely as showing where our lines are, is established so conclusively that every judge can safely rest his conscience upon it.

Within the limits of an argument, you will not expect me to take up all the testimony in detail. I can but state to you what the general result is as candidly and as fairly as possible; knowing very well that if I overstate or understate anything, it will be so much against me and nothing in my favor; for you will verify what I say, or falsify it, as the case may be, by your own examination of the record.

This land lies about fifteen miles south from the southern end of the Bay of San Francisco. It is very considerably higher than the waters of the bay. The whole country, from the foot of the Sierra Azul down to the bay, is an irregular mountain slope. In going from the bay to the land in controversy, if you follow the principal water-courses, you rise gradually at the rate of about seventy-five or one hundred feet to the mile; but if you want to go directly over the country, the way the crow flies, you must cross a succession of hills and hollows; each hill that you come to being a little higher than the one you left behind, and each hollow being also more elevated than the one you have just passed; and through each of those hollows there runs a stream. Thus you go on, until you come to the top of the Pueblo Hills, where you stand about one thousand feet above the level of the bay and overlook the land in controversy.

Continuing your course southward, you go down a rather rapid descent for four or five hundred feet, and you find yourself on the banks of the Alamitos Creek. Crossing that creek, you immediately begin to ascend again, not rapidly, but quite gently, for half or three quarters of a mile, when the acclivity becomes considerable and increases until you get to the top of what are called the *Lomas Bajas*—the low hills—the mining ridge—the *cuchilla de la miña*. That is a range of hills extending eastward and westward for five and a quarter miles, and having an average height of from twelve to fourteen hundred feet above the level of the sea. It is, therefore, as much as three or four hundred feet higher than the Pueblo Hills. Thence southward the descent is rapid, until you come to another valley, not so wide and not so low as that just passed, but like it in all its characteristics. Indeed, it is part of the same valley.



This is watered by the Capitancillos Creek. Cross that creek, and you come to the foot of the great mountain—the main Sierra—the Sierra Azul—which lifts up its head nearly four thousand feet toward the sky. Of course, this mountain forms the great feature of the landscape. It is visible in every direction for nearly fifty miles. There it stands looming up against the background of the southern sky, and limiting the horizon to every eye that is raised in that direction. Of all natural objects, this is the one least likely to be mistaken for any other.

An absurd attempt has been made to confound the mountain and the low hills together. The only reason ever given for saying that they are one and the same is, that they are connected together by a low ridge running transversely across the valley which divides them. It is true that such a ridge exists, or rather that the valley at one place is not so much depressed as it is at other places. The ridge in question is four hundred feet lower than the low hills, and two thousand four hundred feet lower than the mountain. It is a water-shed, on one side of which are the sources of the Capitancillos, and on the other those of the Alamitos. The former stream runs between the low hills and the mountain, and turns the western end of the low hills. The other flows eastward, and turns the eastern end of the hills. The two streams pass down and meet together at the northwestern end of the valley, where they form the Guadalupe River, and through it discharge their waters into the bay.

But does that connection between the hills and the mountain make them one and the same elevation? Such connections between different elevations are so common that it seems to be a law. The Laurel Hill and the Alleghany, two parallel ranges of mountains, are connected together by the Negro Mountain Ridge, which runs across the valley between them, and divides the waters of the Monongahela from those of the Alleghany River; but nobody has ever thought that the Laurel Hill and the Alleghany are the same mountain for that reason. The same thing occurs on the eastern side of the Alleghany. Wills Mountain runs in some places close to the Alleghany, and the two are connected by a ridge which divides the waters of the Potomac from those of the Susquehanna; but Wills Mountain and the Alleghany Mountain are not the same, and have never been confounded together by anybody who had sense enough to know a hill from a hollow.

As it is with elevations of the earth's surface so it is with bodies of water; they may be connected together without being the same thing. The Atlantic Ocean and the Mediterranean Sea are connected together at the Straits of Gibraltar; but no system of geography teaches us that the Island of Sicily is, therefore, an island in the Atlantic. The Golden Gate connects the waters of the Pacific with the Bay of San Francisco; but suppose a county line, or the line of a land



grant, calls for the ocean as its terminus, would any surveyor in his senses think he had responded to that call by running to the waters of the bay?

Those who maintain that the mountain and the low hills are the same, use words which are a contradiction of themselves. Connection between two things does not imply identity, but diversity. When a man tells you that two things are one and the same thing, because they are connected by a third thing, he talks that peculiar kind of nonsense which one is always guilty of when he does not know what he is talking about.

These two elevations, the *Lomas Bajos* and the *Sierra Azul*, are without doubt separate and distinct elevations. The land which lies between the foot of the Sierra and the foot of the Pueblo Hills is known in the parlance of the country as the *Canada de los Capitancillos*, or the Valley of the Little Captains. The traditional history of the country says this name was given after two dwarf Indians, who were the chiefs of their tribes, and who had their habitation in that neighborhood. Even if it were a misnomer to call this a valley, does that make any difference? The people there understood themselves when they called it so; and for practical purposes it does not matter whether the name was scientifically adjusted to the subject or not. We know what is meant when a person speaks of sunrise and sunset, although it be true, astronomically, that the sun neither rises nor sets. For all purposes of common life, the whale is called a fish, though natural history tells us that he belongs to another order of animals. If these parties asked for the *Canada de los Capitancillos*, meaning to include all the land up to the mountain, and the Governor understood that he was granting all the land to the mountain, it matters not whether, properly, it was all valley land, or all mountain land.

But the fact is that it is a valley, and it is but one valley. It is watered by these two streams, the Alamitos and the Capitancillos, from their sources on each side of the ridge, already spoken of, to the point at which they meet and form the Guadalupe River. The valley encircles the low hills. If you desire to see the whole of it, you must start at the ridge, travel down through the valley along the banks of the Capitancillos Creek, turn to the right around the western end of the hills, thence up through the broader part of the valley, keeping along the course of the Alamitos Creek, around the western end of the hills, until you come to the place from whence you started; and in that distance you will not have traversed one foot of land that is not properly valley land. You will not have been anywhere out of the *Canada de los Capitancillos*, but you will have gone quite around the *Lomas Bajos*, which are in the valley.

Somewhere in the valley, which I have thus attempted to describe, lies a league of land which the government of Mexico granted to



Justo Larios. That much is admitted to be true. But it has been a subject of dispute whether the land so granted lies next to the mountain or down at the Pueblo Hills, and how far it reaches east and west. The call of the grant is for an eastern boundary adjoining the western line of the grant made to José Reyes Berreyesa about the same time, and this line is described in both grants as commencing at the junction of the Arroyo Seco and the Arroyo de los Alamitos, running thence southwardly by the eastern base of a little hill (*lomita*), and onward by a straight line to the Sierra. The southern boundary, as called for, is the Sierra. The western is "the Arroyo Seco on the side of the establishment of Santa Clara," which by the admission of all parties means the Capitancillos Creek. There is no call in the grant for any natural object as defining the northern line. That was manifestly left open, because it was impossible to say where it could be run so as to take in exactly a league. The construction given to the grant, by the Supreme Court and by the District Court, locates the league of land upon the three boundaries expressly defined in the grant itself, extending it northwardly far enough to include the proper quantity. The true criteria for the eastern, southern, and western lines are the natural objects called for, and the criterion for the northern line is the quantity of land granted.

This construction having been already given to the grant by decrees which are conclusive between the claimant and the United States, it is not necessary to go behind those decrees for the purpose of showing that they are right. But unquestionably they are right. The grant itself describes the location of the land granted. On the south it is "*colindante con la Sierra*." This word *colindante* has as clear and plain a signification in the Spanish language as any word in any language can have. It is translated by the two Latin words *adjacens* and *contiguus*, which signify *lying next to, touching with*. The etymology of the Spanish word itself shows very clearly what it means. *Linde, lindano, lindero*, are synonymous terms, and mean always a landmark, a boundary. *Co* is the latin *cum* and the English "with." *Colindante* signifies *coterminous, adjoining*. Two divisions of the earth's surface which are *colindantes* must have a common boundary; there can be nothing between them but a line which has length without breadth. If Justo Larios had a league of land *colindante* with the mountain, then his land begins where the mountain ceases, and the mountain ceases where his land begins. To say that he shall have any other terminus or boundary on the south than the mountain would be to take away from him the land that was granted. On the east, he is said to be *colindante* with Berreyesa, and for the same reason he runs to Berreyesa's line on that side. On the west there is no dispute about the creek being the true boundary.

If his survey, as made by the Surveyor-General and asserted by the

claimant to be right, does run to the mountain and not further than to the foot of the mountain, then, as all parties have admitted from the beginning of this dispute to the present time, he is no further south than he has a right to be. It has never yet been asserted that he can be pushed down into the plain except by showing that the "Sierra," as described in the grant, is the low hills, and not the main elevation. The controversy has always been on the question where the mountain begins, not whether the Larios grant goes to the mountain. What did the parties mean, and what did the Governor mean, by the word "sierra," when they gave that as the southern terminus of the eastern line, and described it as the boundary on the southern side?

It must be perfectly manifest to the court, as it has been to everybody else who has examined this case, that if the eastern line be satisfactorily settled the other boundaries will adjust themselves. If that line, the division between Larios and Berreyesa, runs from the forks of the creek to the mountain, then the mountain becomes our southern limit. The western boundary is not disputed, and, as the northern line must be run for quantity, it of course must depend upon the other three. So, therefore, when we settle the eastern line we have determined the whole dispute. Accordingly you will find by the record that every battle has been upon the course and the extent of that eastern line. Berreyesa desired that it should be located further to the westward, and persons who were in possession of the hills desired it to be shortened so as to stop at the foot of the hills as if that were its true terminus. With these latter originated the absurd theory that the low hills were the mountain, because they were connected with the mountain by a ridge.

Now, I aver that this eastern line, which constitutes the whole subject of dispute, is fixed with a perfect and absolute certainty that belongs to no other land boundary in all California. "I know whereof I affirm," and appreciate the responsibility which I take upon myself, when I declare that there is no farm in the Valley of the Susquehanna or the Hudson whose owner knows or can know any one of his lines better than this court can know that line when they look at the evidence. Nay, there is not a town lot in any city of this Union, where land is worth a thousand dollars a foot, whose limits are open to less of fair and honest dispute. The line we claim by has never been honestly denied by any one who understood the subject, unless his mind was wholly warped by prejudice, or his faculties paralyzed by self-interest.

The history of that eastern line is written down in the title-papers, and it can not fail to impress you when you come to read it.

Larios and Berreyesa lived near to each other, below the foot of the low hills, and not far from the creek. They cultivated but little land,



for the plain reason that they had no land which was fit for cultivation. The hills were too broken for the plow, and the plain below the hills was a poor, gravelly, sandy soil, where all the witnesses concur in saying that nothing could be grown. It was so dry that by the 10th of June every spear of grass upon it lay withered and dead upon the ground. From June to January it was as destitute of herbage as Pennsylvania Avenue is now. They lived upon the produce of their flocks, as Job and Abraham and Saul and David did. Their wealth consisted in the large flocks of horses and cattle and sheep that roamed over the hills immediately behind their residence. Those hills were covered with a luxuriant crop of wild oats, upon which their cattle could feed and fatten during the winter and summer.

Each of them claimed a league of land, but they had no titles which would stand the test of judicial scrutiny. The dividing-line between them had never been legally established; they could not prove where it was; neither could assert his right against the other; yet the land that lay between their houses, and upon the hills back of their houses was more valuable to them than any other land claimed by either. It was the portion of their land least likely to be given up without a contest. Under these circumstances, it was the most natural thing in the world that a dispute should arise between them about the division-line. Accordingly you find that in the spring of 1842 something like a quarrel did take place. This waked them up to the necessity of having their domains legally defined. Both of them, almost simultaneously, sent in petitions to the Governor, each asking for a grant to himself by the boundary that he claimed. The petitions and the *disenos* show what was the subject-matter of the controversy. Larios asked for a line due south from the Pueblo Hills to the mountain, running at least a quarter of a mile eastward of his own residence. Berreyesa, on the other hand, insisted also upon a south line, but running directly past the house of Larios, so that Larios could not put his foot out of his own door without becoming a trespasser on the land of Berreyesa. The dispute then was about a strip of land a quarter of a mile in width, and extending three miles and a quarter from the Pueblo Hills to the foot of the Sierra. In their circumstances, it was worth a struggle, and the struggle resulted as might have been expected from the characters of the two parties.

Berreyesa was a very demonstrative and somewhat overbearing old gentleman. He had been a soldier in the earlier part of his life, and he carried some of the habits of the camp into his private affairs. He boasts largely of his military services, and, though he does not tell what battles or what sieges he was in, what hair-breadth escapes he made by flood or field, nor of being taken by the insolent foe, he does recount, with a great deal of self-complacency, how he rose from rank to rank until he reached the dignity of a sergeant, when he retired



without pay or plunder, to repose upon his laurels. His petition, where it speaks of his neighbor Larios, has, all through it, the tone of a bully. Larios, on the other side, was a meek man, perhaps a weak one. At all events, when he was reviled, he reviled not again. He set forth his purchase of the land from Galindo, and the other grounds of his demand, in a way so modest and pretensionless that you can hardly help thinking favorably of him. Berreyesa had also the advantage over him in superior cunning. Before he carried his petition to the Governor he armed himself with a report from an alcalde, which recommended that a grant be made to him with a line past the house of Larios, while Larios appeared with nothing but a naked statement of his rights.

The Governor saw that this was a serious dispute between two *colindantes*, and he determined that it should be settled in such a manner as to preclude future controversy. He therefore referred both the petitions, or rather the subject-matter of both, to the Prefect of the First District, the highest judicial officer in his department; and directed him to call the parties before him, to confront them with one another, to hear their respective proofs and allegations, to ascertain where the line ought to be, and to report the result of his investigations, so that the grants might be made in a way that would be just to both parties. The prefect did as he was bidden. The parties came before him, and he succeeded in conciliating them. They agreed upon a line. Larios was overborne by Berreyesa. The line adopted, though it was not exactly past the house of Larios, was within a few rods of it. Berreyesa got nineteen twentieths of the land in dispute. But they were both satisfied. Larios was satisfied, because it gave him peace with his domineering neighbor. Berreyesa was more than satisfied—it wrapped him up in measureless contentment—because it gave him greatly the best of the bargain. They continued to be satisfied ever afterward. Three months subsequently, in another transaction, they referred to their agreement before the prefect, as final and binding. They accepted their grants by that boundary, and no dispute was ever heard of between them afterward; no trespass was committed across the line by themselves, their servants, or their cattle. Each could say to the other, and doubtless Larios did say in his heart to Berreyesa, what Abraham said to Lot when they divided the pasture-grounds on the plains of Jordan: "Go thou to the left, and I will go to the right; and, I pray thee, let there be no strife between me and thee, or between my herdsmen and thine, for we be brethren."

Now, I submit to the court that it would be one of the strangest events that ever occurred in the history of human affairs, if it were true that this line was not, after all, so clearly established as to be indisputable. It ran through a region where natural objects abounded, by which it could be intelligibly described. The parties were perfectly



familiar with the whole face of the land. They desired to define it with perfect clearness. They invoked the aid of the public authorities to assist them. They were satisfied that they had succeeded. The prefect who advised them was also convinced that he and they both understood where the line was to be, and so did the Governor. Can it be that they were mistaken? Let us take the description of the line which they agreed upon, and see whether there is any ambiguity about it.

The beginning-point fixed upon is the junction of the two creeks. About that fact there has never been any dispute. What was the course of it? They said it should run from the starting-point *southward*. The legal meaning of "southward" is due south, if there be nothing else to control it. But a natural object was called for, the eastern base of a small hill which rises not far from the forks of the creek from the midst of the surrounding level land of the valley. The call for a south line and for the eastern base of that hill happen to be precisely consistent. Some of the earlier surveys made the base of the hill two or two and a half degrees east of south. The last survey was made with great care and skill, and by it the base of the hill was ascertained to be precisely south from the forks of the creek. Then they declared that this south line, running past the eastern base of the hill, should go straight to its terminus without angle, crook, or bend. It remains that we ascertain what the terminus is. Before them, on the course of the south line, lay the green hills upon which their cattle were feeding at that moment; and in the blue distance behind the hills rose the great mountain, barren, rugged, and bare, two thousand feet higher than the hills. To say that they did not know the difference between their own pasture-grounds on the hills and the barren mountain beyond the hills, is wholly preposterous. It is still more absurd to suppose that they would voluntarily exclude their pasture from the grants they were asking for, and leave the hills vacant, so that the Governor might grant them the next day to somebody else, who would drive their cattle down upon the dusty plain, where every head and hoof of them would starve in a week.

This description, considered alone, without reference to the map, makes the line too clear for doubt. They did intend to start at the forks of the creek, to run southward past the eastern base of the *lomita*, and onward by a straight line over the hills to the foot of the main Sierra.

But the prefect knew very well that a mere verbal description, which reaches the mind only through the ear, is always liable to perversion. He determined, therefore, that he would leave it to no quibbling argument upon the meaning of words; he would submit it to the more faithful sense of sight; it should be an ocular, not merely a logical demonstration. He took the map which had been prepared by

Berreyesa, and on which every object referred to in the description of the line was carefully, though rudely, laid down and marked in such a manner as to make it certain what he meant by it. There was the *Sierra Azul*, the *lomas bajos*, the *lomita*, and the water-courses, with the name of each object written under or over it. The prefect took this map and drew across it a dotted line, beginning at the forks of the creek, and going straight past the eastern base of the *lomita*, over the hills to the foot of the mountain. He referred in his report to this map of Berreyesa with the dotted line upon it, and made it a part of his report. It is referred to in both the grants as showing where the true line is.

It is a sin and a shame that any denial of a fact so plain as this should have been tolerated in a court of justice. It is not creditable to the laws of this country, that they are capable of being so perverted as to keep a man in litigation on a question so incontestably clear. It is a foul scandal upon the administration of justice that we are here now for the third time trying to get a right established which depends upon a fact so entirely free from doubt. Yet it is upon a dispute about the course and the distance of that line that all the opposition ever made to our claim has been based.

Upon what sort of evidence have they undertaken to deny that it is where we allege it to be? The record shows none whatever. Not a single spark, not a scintilla, of evidence has ever been adduced, upon any occasion, in any court, that was calculated to raise even a doubt about it. No surveyor, public or private, has ever gone upon the ground and come back with a statement that it could be run, consistently with the calls of the grant, in any but one way. No witness has ever stated a fact upon which an opposing theory could be based. No one has ever sworn even to a contrary opinion. No man who has sense enough to set a Jacob's-staff in the ground, and take sight across a compass, can declare that the line is not run where it ought to be, and in the only place where it can be run, without violating, what all parties here admit should not be violated, the calls of the grant.

The first survey was made by John R. Snyder, in the employment of Grove Cook, to whom Larios had sold the land, in July, 1845. The survey was made in 1847, after Cook had heard of the attempt to appropriate his property by certain persons who pretended to have discovered a treasure upon it. The line then run by Snyder started at the forks of the creek, ran eastward of the mine, and up to the mountain as it runs now.

Afterward Stratton ran the same line for Berreyesa, who had cast a covetous eye upon the quicksilver hills; but Stratton could not pervert the line, nor turn it out of its course, nor stop short of its terminus, and he therefore placed it precisely where the Surveyor-General put it afterward, and where Snyder had placed it before.



In 1855 Hays and La Croze, under instructions from the General Land-Office, made another survey. They ascertained the objects which should control the course and termination of the line together and settled them carefully. That was before any decree was made except the decree of the Land Commission which simply referred to the grants and the map as showing where the line should be located.

Afterward again the same line was surveyed twice by Mandeville, once for Berreyesa, and once for us, and again both surveys ran precisely in the same way.

That is not all. It became necessary to ascertain where the eastern boundary-line terminated, whether at the mountain or the foot of the low hills, before the rights of the Guadalupe Mining Company could be determined. They got a survey made of the fourth of a league which had been sold to them. By that survey, as by the others, it was decided that the southern line of the grant to Larios was the foot of the mountain.

Every survey, therefore, official and unofficial, public and private, has concurred. All agree that the line starts at the spot, is on the course, and terminates at the place where we say it does.

No surveyor, with the grants and the *disenos* in his hand, could fail to find the place of beginning; no one could miss seeing the eastern base of the *lomita*; nor was it possible for human perversity not to perceive that the terminus of the line was at the foot of the great Sierra. The line was marked by monuments which could not and would not be trifled with. The blue mountains, the green hills, and the rolling streams, testified to it with a voice which no sophistry could obscure and no perjury could contradict.

On the other side of the question, the principal name that is used by our adversaries for the purpose of mystifying the subject, is that of Mr. William J. Lewis. You can not read the testimony of that witness without perceiving that he is a man of very considerable ability, and of much skill in his profession as a surveyor and a draughtsman. Nor do I know anything that would justify me in making any imputation upon his integrity. He was a professional man. He was willing to sell his talents to anybody that would pay his price for them. He would do any job in his line that was desired in the way most satisfactory to his employers; and after he had done it, he did not consider himself at all responsible for the use which might be made of the materials which he had furnished. This man was employed for years (not all the time, but off and on) in doing everything that a surveyor and a draughtsman could do except going, like an honest man, upon the ground, running the line in dispute, and saying whether it was at the right place or the wrong one. They did not ask him to do that, which might have been done in a day, but they kept him for months and years, running over the hills, measuring every height and chaining

every hollow, and making maps and diagrams of all the ranches for fifteen miles around. At one time you hear of him at the top of Mount Umunhum, four thousand feet up toward the sky. The next thing you know, he is down in some dark hollow, measuring away at something else, but always as far as he can possibly get from the line in dispute. One day he is off ten miles to the east of Berreyesa, and then again he is surveying a rancho somewhere north of the Pueblo Hills, clean out of sight of this region. When asked on his oath why he had done certain things, he gave, as a reason, that he was requested to do so by those who had employed him.

Some things he could do, and some other things were beyond the reach of his skill. He could make what he called a survey of the Larios rancho, locating it below the mining ridge, so as to make it appear that Larios was absurd enough, in 1842, to take a grant of that naked plain and leave out the hills upon which he relied for a living. How did they get Lewis to do that? By withholding from him the evidence which showed where the true location was. They gave him, not the grant to Berreyesa and Larios, but only the *diseno* of Larios, on which the low hills did not happen to be laid down. By closing his eyes upon the evidence, and getting him to assume that Sierra del Encino meant not the mountain, but the low hills, it was not a difficult thing for him to suppose, or to say, that the southern boundary of the Larios tract was the foot of the Lomas Bajos. He made this assumption contrary to the truth, as proved by clouds of witnesses, that Sierra del Encino meant the great mountain, so called because of the remarkable oak-tree which grew upon its side—contrary to all the evidence which declared that the Lomas Bajos were never known nor called by any such name. But though he did it contrary to the evidence, it was probably not his fault, for the evidence was carefully excluded from his sight by those who employed him. He had not seen the map of Berreyesa, upon which the common line of Berreyesa and Larios both was laid down.

When asked on his cross-examination whether he could have made such a survey with the Berreyesa map before him, he admitted that that would have been another thing. So this attempt to get the authority of a surveyor on the opposite side of the scale against all the other surveys was a failure, and it was abandoned of course.

Some other things Mr. Lewis could do for his employers. He could make maps, and all those maps, or most of them, with which your tables are covered, came from that mint. The object being not to exhibit the truth, but to pervert it, they are as far as possible from being a simple exhibition of the lines which bound these two grants, or either of them. They purport to be topographical maps of a large region of country, and are laid down in such a manner as to exhibit the survey in a most unnatural position. The red lines, which



you see running from one point to another, were none of them placed there to show what the lines of the survey are, but were made as the foundation of some theory upon which the survey could be contradicted and impugned. It will be observed, also, that these maps represent the land near the forks of the creek as being a perfectly level plain; looking at it casually, you would suppose it to be a rich alluvial bottom as even as the surface of a lake. It is not so. It slopes from the southeast to the northwest, and the surface is, like that of other semi-mountainous formations, unequal. But he takes care to make this appearance of valley terminate just where his employers wanted to say that the mountain began. When he gets to the upper part of the valley he magnifies every little inequality so as to make it look just like the mountain. He marks the various elevations upon the mountain and the hills. Here it is fourteen hundred feet; here twelve hundred; here eleven hundred; but down in the valley behind the hills, where the land is depressed seven hundred feet, he does not mark the heights of those places, but shades it all in the same way as he does the mountain heights. It would never strike you, looking on this map of his, that the land here is seven hundred feet lower than the low hills on one side, and twenty-seven hundred feet lower than the mountain on the other side. This thread of water looks as if it were running along on the brow of the mountain, and you wonder why such a stream should not rush down the mountain-side in a succession of cascades; but the reason why you wonder is, because you do not know that between your point of view and that water there is a range of hills seven hundred feet higher than the bed of the creek. Such maps as these, well marked as they are with red lines, would furnish the material for many a long speech, and many a one has been made upon them, in court and out of court, that has "split the ears of the groundlings" sundry times.

But all the time these things were in the course of manufacture, Mr. Lewis knew, and his employers knew, that the true line which it was their object to pervert and falsify was just where the Surveyor-General said it was. He had not been measuring that country all over, and making diagrams of every spot of ground in a circumference of fifty miles, without knowing what he was doing it for, or without knowing where the true line was. I say he knew it, and if he had told at first what he did know, the question would have been settled long before it was. But he did settle it at last. When he was sworn, he was made to talk plain English, and tell the plain truth. On pages 355 and 356 of this record, you find him speaking to the very point. He was told, "Take your map and show us whereabouts on that map lies the line that the Surveyor-General has made"; and like a man who understood the obligations of his oath, he did what he was bidden to do. He marked the Surveyor-General's line with red ink



and said, "It lies here from *O* to *R*." Remember, if your honors please, that is the line by which we claim. Several other questions were then put to him, and finally it was demanded of him to say where is the line that Fernandez marked upon the map of Berreyesa. Now we shall see whether Mr. Lewis will contradict all the other surveyors or not. I pray you mark his answer well on page 356. He says that the dotted line upon Berreyesa's map runs *from O to R as nearly as it can be determined, that is to say, it runs precisely where the Surveyor-General has put it*. He attempts some qualification of this answer, and by that means clinches the nail which previously he had driven to the head. He says that there is room for a difference of opinion; this is a long line made by the production of a shorter one, and a slight difference at the point of beginning might make a considerable difference at the other end. Then he was asked this question in substance: Making allowance for every possible difference of opinion about the point of beginning, what difference would that make at the southern end of the line? and he answers, "*At the utmost not more than fourteen chains.*"

Thus the only witness upon whom our adversaries could rely to contradict our survey deserts them at the last moment. With one breath he sweeps away all the rubbish that he and his employers had been gathering about it for years—sweeps it away as the wind sweeps the chaff from the summer threshing-floor. "Roll up the map of Europe," said William Pitt, when he heard of the battle of Austerlitz—"roll up the map; it will not be wanted for twenty years to come." Well might Castillero and Barron have said, "Roll up these maps and carry them away; they are of no use now, and never will be until this evidence is forgotten." Yet this cast-off trash of the New Almaden Company, treated with contempt by the court below, abandoned by its authors because they were ashamed of its hollow falsehood, is brought here, vamped over again, rehashed, reproduced, and paraded for the delectation of this court by the counsel of the United States. But he takes precious good care not to call your attention to the plain, direct, clear truth, stated by Lewis himself. Why? Because he knew very well that the simple fact thus proved would go through and through his flimsy sophistry, as a battering-ram would go through a wall of pasteboard. He must make a speech, forsooth, and if he would acknowledge the fact that Lewis proves, his speech would come to a sudden and a violent end; if he but looked it in the face for one instant it would strike him dumb upon his feet.

We have no right to complain of the courts, or of their dealing with this testimony. The long delay which the claimant has endured is not the fault of any court that I know of; for the decisions have been uniform, constant, without variation, in favor of that line, down until the last decision of Judge Hoffman. When the case went be-



fore the Land Commission, that board concurred with all the surveys that had been made before. They understood the responsibility that was upon them, for they knew that the line run, as they described it, according to the calls of the grant and referring to the Berreyesa map, would include the mine. When the case was taken to the District Court, a very elaborate investigation of everything connected with all the lines was made. After years of controversy there, and the production of a large amount of evidence on both sides, the court determined according to all the evidence—for on one side there was really no evidence at all—that the eastern line began at the forks of the creek and ran to the mountain, and that the mountain was our southern boundary. They gave us, however, more land than we were entitled to, by the error which they committed in relation to the northern line. That decree was brought into this court by appeal, and it was here decided that there was no ambiguity about the grant, that the three lines of the land granted to Larios, on the east, south, and west, were well defined by natural objects on the ground, and the fourth line should be so run as to include, between itself and the other three lines, exactly one league of land. That league was confirmed to us, and declared to be our property. When the case went back to the District Court, that court, notwithstanding the protest of the claimant, opened everything for reinvestigation: a new contest took place again about the eastern line and the southern line; the whole ground was gone over again, and another year of litigation followed. But it ended in a decree declaring that we were entitled to the land within the boundaries of the survey as now claimed.

In the mean time the very same questions arose incidentally in two other cases. Berreyesa's claim went before the Land Commission. His western line was our eastern line, and the decree there was the same as in our case. The District Court and the Supreme Court both affirmed the decision. The Guadalupe Mining Company was the owner of one quarter of the Larios grant upon the western side, and prosecuted the claim for it separately. It was necessary, there also, to determine whether the Larios grant ran to the mountain, and it was decided by the Land Commission and the District Court that it did. Nine decrees under the act of 1851 were successively pronounced upon that same subject-matter, and every one of them affirmed our right to the mountain as the southern boundary of the lands granted to Justo Larios. With these adjudications establishing our right, all standing unreversed upon the record, who could interpose to prevent us from getting a patent? The United States could legally and justly make no further objection. But other parties procured the passage of the Survey Law of 1860, which was a grievous and inexpressible hardship upon the claimants under Larios. It did not promise to the parties in opposition the remotest chance of defeating

our right; but it put into their hands the means of delaying and baffling what all knew to be the claim of the true owner. The provisions of the Survey Law have been used for that purpose. Castillero, Barron, Parrot, and others, with Foster for a make-weight, brought the survey into court.

The survey as made by the proper officer of the United States, the Surveyor-General—the survey which is the subject of revision now and here—was made in precise accordance with the decree of the District Court under the law of 1851. No one ever denied that; on the contrary, its validity is actually attacked in this court on the very ground that it does follow the decree precisely.

Here I must pause to answer the assertion of the Attorney-General's assistant, that our survey is void, because it is in exact conformity with the decree which authorized it. According to his notion the Surveyor-General, when he comes to locate a tract of land which has been confirmed under a Mexican title, may go vagabondizing all over the country, and survey to the claimant any land he pleases, so that he does not survey the same land that was confirmed. If a claimant asserts his right in the Land Commission and the District Court to a certain league of land, and the United States opposes the claim, upon the ground that his title applies not to that league, but to some other league, and the decision of the court having jurisdiction of the subject is that he owns the league he claims, the Surveyor-General may, notwithstanding the decree, survey to him the other league, which the court has pronounced to be public land, or the private property of some other citizen. That was precisely the case here. The alienees of Justo Larios asserted their right to a league of land bounded by the mountain on the south. The United States averred that his title was for a different league, of much less value, bounded by the Pueblo Hills. The court confirmed and established his right to the league at the mountain, and the assistant of the Attorney-General now argues that the survey is void, because the Surveyor-General measured and marked upon the ground the land that was confirmed by the court, and not other land which the court decided to be public property. That such a proposition should be made by any lawyer, in any court, would be strange enough; but that it should have been made by a gentleman in the service of the United States, and in the Supreme Court, is a fact which I would not believe without the sensible and true avouch of mine own eyes and ears.

But this is a point upon which the Attorney-General and his assistant are again in conflict. The chief law officer of the Government, with a candor and a fairness which does him honor, utterly repudiates the doctrine of his assistant. He says that the survey must be made of the same land which has been confirmed, and admits that



the Surveyor-General has no right to survey and return for patenting other land, which belongs to other parties or to the public.

The act of Congress defining the duties of the Surveyor-General expressly and in plain terms declares that, when a confirmation is made under the act of 1851, he shall survey the same land that is confirmed, and this is repeated more than once.

If you will look at page 405 of this record, you will find the instructions given to the Surveyor-General of California by the Land-Office. Foremost, principally, and first of all, is the great fundamental rule that he must take care, when surveying confirmed lands, always to follow the decree, and never, in any case, presume to depart from the lines there described. The Surveyor-General has never, in any case, violated these instructions, or presumed to entertain an appeal from the decision of the Land Commission, the District Court, or the Supreme Court.

If this survey is void because it follows the decree, then all the surveys in California are void for the same reason. If the surveys are void, so are the patents, and there is not a single title established in all California.

I admit that there may be cases in which the decrees themselves do give to the Surveyor-General a certain amount of discretion, which he is to exercise according to his best judgment. For instance, a claimant has confirmed to him one league of land, lying within limits that contain eight, ten, or twenty leagues. There he may *prima facie* take his league of land anywhere that he chooses to have it within those boundaries, and he must signify his election to the Surveyor-General. It is the Surveyor-General's duty to see that the location shall be made in such a manner as to do no injustice, either to the public or to any private party who may have rights to land in the same locality.

Where the grant is for a certain quantity of land within limits containing a larger quantity, the decree of the court must necessarily follow the grant, and confirm to the party such title as he has. If it be a floating grant, the court confirms it as a floating title, and leaves to the Surveyor-General the duty of anchoring it by a survey; but if the grant be for a certain specific piece of land, with certain boundaries expressly described as the boundaries of the land granted, there the decree is false, unless it confirms the title of the claimant to the very land which his grant describes. For instance, suppose the grant to be for a town lot, fifty varas fronting upon a certain street and extending fifty varas back to another street, is the court not bound to decree that he is the owner of that same lot? Or, suppose the claim to be for an island, must not the court pronounce what island is the subject-matter of the grant?

Whether a grant is a floating grant or a fixed one; whether it applies to a certain definite portion of the earth's surface, or applies

equally well to more than one spot, is a question of construction. It is the business of the court, under the act of 1851, to interpret the words of the grant, and determine whether it is fixed or floating. In this case the grant has been construed. It received its just and true interpretation in this court and in the District Court. It is decided to be a specific grant of a certain well-defined league of land, lying next to the mountain on its southern side, reaching to Berreyesa's line on the east, to the Capitancillos Creek on the west, and extending northward as far as may be necessary to take in one league of land. Yet the survey is here alleged to be void, because it took in this league of land, so confirmed to the claimant, and did not include what was pronounced by the same decree to be the public property of the United States.

The survey was brought into court under the act of 1860. A monition was issued, calling upon all parties who were interested in it to appear and make objections, if any objections they had. No one then thought of objecting to it on the ground that it was a survey of the same land which had been confirmed by the previous decree of the court. The claimant was bound by the decree, and therefore bound to accept the survey in accordance with it, for that was the only survey he could have. The United States, being parties to the same decree, were also bound by it. They could start no objection which would not open a question which had already been decided by the proper court under the act of 1851, upon a full and fair hearing.

The United States made no objections at all. That being the case, can they make any objections in this court? It is not possible that such a perversion of justice can be tolerated here. If the Government had any objections to the survey, we had a right to know them then and there, so that if they were true we could obviate them by such a modification of the survey as might seem to be necessary; so that if they were false and unfounded we might produce the evidence to show it; and so that if the case should ever come into the appellate court we might have the evidence on record which would prove the truth. To change the survey here, upon grounds that were concealed from us in the court below, is to condemn the party without a hearing. To hear us in this court upon a record which does not contain the evidence which might have been given in the court below is no hearing at all. The Attorney-General lay low in the District Court, denied that he had any objections to offer, studiously concealed from us the intention to make opposition, there or here, down to the moment when the argument in this court was about to commence, and then suddenly sprung upon us, from his pocket, a set of objections never heard or thought of before. Can he do this thing? I answer, No; no more than he can set a man-trap in the middle of



Pennsylvania Avenue, and cover it up so as to catch the first unwary passenger that comes along.

But the Attorney-General, at the time when he decided that no objections to this survey should be made in the District Court, was not actuated by any evil motives, or any unjust designs upon the claimant. He knew then what he was doing perfectly well. He understood the rights of the claimants, and the rights of the United States. He decided justly, and well, between them. He made no objections to the survey, because he knew that the United States were estopped by the previous decree. I need not elaborate that point, for the Attorney-General understands it now as well as he understood it then, and he has not ventured to assert that he can get behind the decree. On the contrary, he has expressly admitted that he can not.

But there were other reasons. When the case was here first, this court said that the United States should not act as a contentious litigant, but as a great nation seeking to administer justice among her people. After nine judicial decrees had been made, upon the very same question of fact and law, this Government would have been a very contentious litigant indeed if it had tried to raise the same question a tenth time. An individual who would act in that manner would find no favor in the eyes of any court, but would be treated with all the marks of dislike which could be shown to a stubborn and unreasonable suitor.

That was not all. Every officer of the United States knew that the survey was precisely right, and that the decree under which it was made stood firm upon the truth and justice of the case. The local officers of the Government in California had watched the current of this heady fight for seven years, and not one of them had a doubt about the justice of the claim. The Attorney-General's office was filled with reports upon it, which came by every steamer. No man in that department was perverse enough to misunderstand its merits. How could any officer object to this survey? What could he say against it? If he desired to change it, he must take some objection either to the course or the distance of the eastern line; and what would he say about that? If he would assert that it did not begin at the forks of the creek, the hot blood of shame would suffuse his cheek; his face would grow redder and hotter, if he should undertake to declare that it did not run straight past the eastern base of the little hill, toward the mountain. And if there was one spot upon his visage where a blush might speak, it would be crimson when he would undertake to place upon record the averment that it did not go all the way to the mountain. Nay, it was not merely a legal estoppel which forbade the filing of exceptions; honor, conscience, and decency demanded the unequivocal admission that this survey was right. And that admission was made.

If this posture of affairs between the United States and the claimant is the result of any trick, scheme, or evasion of the law, the offense against justice was committed when the Attorney-General decided that no objections should be made to the survey. Then was the time the scheme was concocted ; then the trick was played ; then the law was evaded ; and the Attorney-General's office was a party to it. Upon whom does this calumnious accusation fall ?

The survey was brought into court on the 19th of December, 1860. It happens, by a singular coincidence, that on that very day Mr. Stanton took charge of the Law Department. He knew every point of this case as I know the fingers upon that hand. If he abandoned the rights of the United States, he did it with his eyes wide open to the truth. I happen to know that gentleman as a lawyer very well. In some other respects, it is possible he may be beyond my depth ; but, in his professional character, I know him as well as one man can be known to another. I aver that no lawyer in this nation or elsewhere understands the ethics of his profession better, or lives up to the rule of its morality with a truer spirit. He was then in a purely professional office, and he guarded the rights of the public, as he would have guarded those of any other client, to the full extent that his sense of justice permitted him to go. Why did he order that no objections to this survey should be made ? I will tell you. It was because he was incapable of descending to the baseness of objecting to a claim that, in his heart, he knew to be just and right. If there had been a question between doing that and resigning his office, he would have thrown back his commission with a manly scorn.

Mr. Bates succeeded him on the 4th of March, 1861. Surely no one who knows him will say that he failed, either ignorantly or willfully, to place the rights of the United States in a defensible position. It was equally impossible that he could participate in a trick to defraud the public. On his brow such a shame as that would be ashamed to sit. I know that he had not all the opportunities which Mr. Stanton had of understanding the details of the case ; but it required no great investigation. A glance at the record would tell him that all questions between the Government and the claimant had been already settled. The simplest brief upon the evidence would show him that no man, without shameless falsehood, could say anything whatever against the correctness of the survey. These are views which his whole argument here shows that he entertains at the present moment, and he caught them then rapidly and readily. Spanish titles were no novelty to him ; he had lived and practiced among them all his lifetime. He had been the judge of a land court. His mind followed a line as an old Indian would follow a trail through the wilderness. Besides, he had an abundant corps of assistants. The next man below him was Mr. Coffey, of whom I can say with safety that he stands



among the foremost men in the country of his age. His immediate predecessor, too, was at that time his habitual adviser upon all these subjects. Mr. Bates understood what he was doing. He knew what the evidence was at the time very well. Perhaps he has forgotten it since. His speech is silent upon the facts; therefore I can not tell what the state of his memory may be. Perhaps somebody else has given him another version of it since, and so misled him.

When Mr. Stanton and Mr. Bates decided that no objection should be made to the survey, and no appeal should be taken from the decree of the court below, they settled this case so far as concerned the rights of the United States. They had the power to settle it; it was their duty; it was the legal function of their office to determine whether the United States had any interest in this question, or any land in that place. When they made their decision, they took away from this court, and from all courts, the authority and jurisdiction to decide either way upon the same subject. It is unfair for the Attorney-General to come here now and attempt to divide with this court the responsibility which he then took upon his own shoulders.

Other parties, who were not bound by the decree of 1858, came into court upon the monition, and did make exceptions. Those of Castellero and his party, as well as those of Foster, were overruled, and they took appeals, which appeals they have asked leave to withdraw. The Attorney-General concedes that right to them, and they are withdrawn, of course. With these exceptions, therefore, we have nothing to do; they are out of the case.

That brings me to the only exception left standing—that of the Berreyesa party, defended here by Mr. Carlisle and Mr. Williams. That exception is curious enough to be a remarkable feature, even in this most extraordinary case. I need not say to any member of this court that the office of an exception is to point out the distinct error of the thing excepted to, so that the other party may be able to meet it with the necessary proof, or, if it be true, to admit it. In a court of chancery, or a court of admiralty, when a master's report is brought in, and excepted to in general terms, because it gives too much to one party, or too little to another, such an exception is regarded as frivolous, and unworthy the attention of any court. In this case the counsel of the Berreyesas say, in their exception, that the survey includes land within our lines which they ought to have; but they do not say how much land, or whereabouts it is, nor tell us how the line could be run, consistently with the calls, so as to give them more, or us less. From such sublime generalities it is impossible to learn what they would be at. The gentlemen who drew this exception, Mr. Williams and Mr. Sloan, seem to have been conscious that something more specific than this was needed, and therefore they undertook to point out where the line ought to be run; they attempted to describe the



true line. That description, so made by the counsel of the Berreyesas, is a most singular proof that "truth is mighty, and will prevail." They say, as we say, that it begins at the forks of the creek, and runs southward across the low hills to the mountain, in all of which we most potently believe, and most cordially concur. Their averment concerning the line—its beginning, middle, and end—is precisely ours. They declare in their exception that it runs exactly where the Surveyor-General has put it.

Your honors remember that, when the king of the Moabites heard that his country was invaded by the wandering army that came up from Egypt through the wilderness, under Joshua, he sent for Balaam the prophet to come and wither his enemies with a curse. "For well I wot," said he, "that whom thou cursest God will curse." He took him up to the top of a mountain and promised that, if he did what was desired, he would give him a great reward and high promotion. He showed him the hosts of his foes encamped upon the plain, and he said: "Come, curse me Jacob, and come, defy me Israel." The prophet opened his mouth and spake; but, instead of cursing Jacob and defying Israel, he altogether blessed them. When the king complained that this was not exactly what he had bargained for, the prophet replied that if he would give him his house full of gold and silver he could speak neither more nor less than the truth. Those gentlemen were like the prophet; if Berreyesa had given them his house full of gold they were too honest to say anything except what they were constrained to say by the spirit of the truth.

Take a retrospect now. Let us look at the log-book and bring up our reckoning. Our grant was admitted to be an honest one from the beginning. Nothing but its boundaries were ever disputed. Six several surveys were made to ascertain them, and every one determines that the lines we claim by are the true lines. We prove these surveys to be correct by many witnesses, and those who are called against us testify in the same way. Decree after decree, to the number of nine, gives us the land that we claim. The United States, by the act of their Attorney-General, admit the justice and truth of all we ask. Still, private parties, to baffle and delay us, put in their exceptions. Two of those parties retire from the contest, and that leaves us with one solitary foe to contend against. Berreyesa still utters an indefinite grumble, which shows that he desires to have our property, but does not know upon what ground he can demand it. We turn to him and say, "If you disbelieve in all these surveys, those made by yourself as well as by us, and all those decrees to which you as well as we were a party, come now, tell us where you think the true division-line between us is? Take the advice of counsel, and set down your own description of the line in writing, and place it on the record." He undertakes to do so, and he describes the line as we



claim it exactly. After all that, we certainly should have had no further trouble.

Mr. JUSTICE MILLER.—Allow me to ask you, Mr. Black, how you regard the decree of 1858, of the District Court, as affecting the rights of Berreyesa? I understand your argument very clearly, that the United States, being a party to that proceeding, is bound by that decree, so far as it settles those boundaries.

Mr. BLACK.—Yes, they are settled between the United States and the claimant.

Mr. JUSTICE MILLER.—Now, as to Berreyesa, who was not a party to that decree, but who comes in on this survey professing to be made under that decree, do you claim that he, also, is bound by that decree or not?

Mr. BLACK.—The general rule of law undoubtedly is that none but parties to the record, or their privies, are bound by the judgment, sentence, or decree which may be pronounced in any case. Besides that, the act of 1851 expressly declares that third parties shall not be bound by a decree made under that act between the United States and the claimants. I think, therefore, that no third party can be affected in this proceeding by the decree made in 1858 between the United States and Fossatt.

But Berreyesa is bound by the decree in his own case. Here were two grants which, properly enough, are called by the United States twin grants. They were for two leagues of land, to two different persons, with a defined line dividing the lands of one grantee from those of the other. The rights of the two parties were decided in two several cases, and the division-line was ascertained, in both cases, to be at the same place. These two decrees, taken together, estopped both the parties. Fossatt can not assert his rights to any land eastward of that line, nor can Berreyesa demand what lies west of it. The two decrees together are the same as a joint decree against both, or in favor of both; it is conclusive between themselves and conclusive as against the United States.

Nevertheless, the judge of the District Court, without an exception which contradicted our survey, and without a shadow of evidence to show it was wrong, made that unaccountable decree, which converted the straight line into a crooked one. He went against all parties and all witnesses, and in the teeth of all the documentary evidence. Instead of the true and plainly proved line, he ordered another to be run which nobody before had ever suggested or thought of. If this decree, asked for by nobody, believed in by nobody, defended by nobody, but admitted by everybody to be erroneous, can not be set aside, there is not much use for a Supreme Court.

I have nothing harsh or disrespectful to say of the judge who made that decree. He is not on trial here. It is not the interest of any-

body to defend him, and his station disarms him of the power to defend himself. I have no right to go beyond a fair criticism upon his opinion, and I can do that only so far as may be necessary to show that it is, what I believe it to be, a hasty, inconsiderate, and erroneous judgment.

The judge is not in the habit of deciding a case without supporting it by reasons either good or bad; he is skilled in dialectics; "for every why he has a wherefore." He has given us, in this case, the premises and the reasoning which brought him to the conclusion expressed in the decree. I advert to them because they include all the arguments made by Mr. Carlisle and Mr. Williams, as well as some others which they do not venture to reassert.

The first noticeable thing in the opinion is, that it concedes to us every fact which we have ever asserted with reference to the division-line. The judge admits that the true beginning of it is at the forks of the creek, that it runs thence southward by the eastern base of the *lomita*, a fact which he declares it impossible for any one to doubt who looks at the map of Berreyesa. Then he also admits that the call of the grant is for a straight line upon that course up to the mountain. Why, then, did he not follow the call as the Surveyor-General had done before, as he himself had done in all his former adjudications? We shall see.

He says that when Berreyesa and Larios agreed to that line, he thinks they intended it to run, not south, but perpendicularly to the general direction of the valley. I deny this utterly. In their agreement before the prefect, and in the grants which both afterward accepted, they declared their intention that it should run south, and not a word is said about perpendicular. But the intention thus expressed by themselves is disregarded, and a totally different intention imputed to them, without a shadow of evidence; and this, be it remembered, after their express agreement has been not only acted upon by the Governor and other Mexican authorities, but after purchases to the amount of millions have been made, upon the faith of it, from both parties. It is remarkable, too, that the judge, after assuming without evidence that their intention was to make a perpendicular line, does not order the line to be run according to his assumption. He directs it to be carried southward to the base of the *lomita*, then makes an angle, and runs  $54^{\circ}$  west for a certain distance, where he makes another angle, and then goes  $34^{\circ}$  west of south to the mountain. Neither of these lines is perpendicular to the course of the valley; for certainly the valley can not have three perpendiculars. The due south line is nearer perpendicular than any one of them. It is, in fact, exactly perpendicular to the direction of the valley at that place; it starts at right angles with the Pueblo Hills, and strikes the mountain squarely.



The judge commits another error of fact when he declares that the position of the *lomita* was misunderstood by the parties. If there is one thing in this case more striking than another, it is the remarkable accuracy with which the agreement and the grants defined the relative position of that little hill and the beginning-point of the line. They declared that its eastern base was south from the forks of the creek, and an accurate survey proves it to be exactly so.

But he says that if the line be continued upon that course, according to the calls of the grant, it will *unfortunately* throw nearly the whole of the mining ridge upon the tract of Larios. This is an expression which, I am confident, the judge did not mean to be understood as it might be construed by evil-minded persons. To the eye of prejudice or passion, it looks like an open confession of partiality; like a predetermination to relieve the misfortune of a man who is not the owner of certain valuable land, by giving it to him, at the expense of another who is. If such a sentiment had been entertained, I think the judge would not have written it down, and placed it upon record. I mention it only as another evidence of the haste and want of consideration with which the opinion was written, and the decree made.

The judge thinks, and in this he is followed by Mr. Carlisle and Mr. Williams, that he can see, in the shape of the Sierra Azul, the different portions of the mountain. He assumes that certain parts of it, which are larger than other parts, are intended for Mount Bache and Mount Umunhum, and proposes that the line shall be run so as to strike the mountain at the place where it terminates on the map of Berreyesa, assuming that he knows where that place is. Now, no one can cast even a careless glance upon the figure, which Berreyesa called by the name of Sierra Azul, without seeing that it bears no sort of resemblance to the natural mountain itself; it was not intended to be a picture of the mountain. If one part is higher or lower than the other, it was mere accident. All the reasoning upon which this hypothesis proceeds is based upon the assumption that the different objects delineated upon the map are laid down in their proper proportions to one another, and that the different parts of the same object are also duly proportioned. Admit that assumption to be false, and the whole argument falls flat to the ground. It is utterly false. There is no pretense of proportion about the map. Here is a fact which sets it in a very striking light. The house of Berreyesa is proved to be exactly thirty feet wide; yet it occupies upon the map one fifth of the space of the whole valley. If the valley is proportioned to the house, it is only one hundred and fifty feet wide. If you take the valley to be, as it is at that place, nearly a mile wide, and the house to be laid down in proper proportion, then that house covers about two hundred acres of ground; and if it be high in proportion to its width, it is ten times as high as all the pyramids in Egypt, piled upon one another.



The same logic that proves this to be Mount Umunhum, and that to be Mount Bache, would have shown with equal certainty that Berreyesa lived in a structure so vast that all the men in America could not have put it up in half a century.

Supposing that one or both of the parties, at the time they made that agreement, had actually believed that a straight line, run upon the course which they agreed to, would strike the mountain at a different place, would that be a reason for setting aside the agreement and disregarding the grants, after the acquiescence of all parties for twenty years? Certainly not. If a surveyor had gone upon the ground, and had run that line, when the grants were not more than a month old, and Larios had said that he was disappointed in the outcome of the line he agreed upon, could any officer run it contrary to the grant for that reason? No, the answer would be, "Your agreement has been executed; the grants have been made to you and to your neighbor both—to you for the land on one side, to him for the land on the other side—and it is now too late to repent." *A fortiori* would the same answer be given to Berreyesa, and *a multo fortiori* must it now be given to the alienees of Berreyesa, after purchases have been made to so large an extent from Larios and his assigns.

But this map of Berreyesa does show conclusively that both he and Larios understood perfectly that the straight line which they bargained for would run where it does run, east of the ridge, and east of the New Almaden mine. The ridge divides the waters of the Capitancillos from those of the Alamitos. The mine is near that ridge. The Alamitos Creek is laid down on Berreyesa's map. The division-line—the line in controversy—as laid down on the *diseno* itself, runs across the Alamitos Creek, the whole of which is east of the mine, not across the Capitancillos, which is west of it. If the parties were familiar, as everybody admits that they were, with the ground, then the line must have been intended by them to run very nearly, if not exactly, where it does. This fact, showing the place where they intended to cut the creek, is as conclusive upon the subject as any fact of that nature can be, and it is absolutely without contradiction.

To reverse this decree is a legal necessity, and you can not do that without restoring the division-line to the place where the Surveyor-General located it. There is no other place for it. You can not find, in all this record, any other description of that line which it is possible for you to follow. If you take the exceptions of the Berreyesa party themselves, you find them describing the Surveyor-General's line as the true one; nor is there a spark of evidence which would justify any court in adopting another.

If the lines of our survey be established, if it be true that they are laid upon the ground according to the calls of the grant, with a straight line between us and Berreyesa on the east, the mountain on the south,



and the creek on the west, are we not perfectly right in saying that our league of land lies up next to the mountain? I put that question now, because some people have taken it into their heads that these are what they call external lines, and that our grant is a floating grant.

We claim that this survey is right, because it is made under a decree of the District Court, which confirms to us the land which lies within the lines of the survey; and, according to that decree, our land is there and nowhere else. If it had been a floating grant, you can not say that it is a floating decree. Nobody denies that the decree is definite and distinct, and confirms to us this specific piece of land. The Attorney-General himself does not deny that that decree is binding upon us and upon the United States. Mr. Bates, sitting there in his proper seat, yesterday denied that he meant to go behind the decree. When I imputed that intention to him, he used the emphatic word "*never*." I think he spoke that upon deliberation. But his assistant counselor has gone behind the decree in the whole of his argument. He and the Attorney-General have been running foul of one another on that point all the time.

MR. JUSTICE CLIFFORD.—You contend that the controversy should have ended with the decree of 1858.

MR. BLACK.—Nay; I know that it did end there. If that decree had been brought up on appeal, this court might have reviewed, and reversed or affirmed it. Thus, you might have declared that the land did not lie there; but inasmuch as the decree of 1858 is in full force, and is a confirmation of the very land surveyed to us, and a confirmation of no other land, the survey is right if it follows the decree; and if not, not. Without an appeal from the decree of 1858, the same question there determined can not be raised in another and a different case. The Attorney-General admits, what is manifestly true, that this is a different case.

MR. JUSTICE CLIFFORD.—There has been a new survey and new evidence since then.

MR. BLACK.—There has been a survey, and new evidence by private parties has been given, to show that it is wrong. No evidence has been offered on the subject, one way or the other, by or against the United States, for the United States have admitted it to be right. As between us and the United States, what is the standard of right and wrong by which the survey is to be judged? Certainly nothing in the world but its correspondence, or failure to correspond, with the decree which had previously settled our boundaries. The survey was open to such objections on the part of the Government as would show that it did not correspond with the decree; the United States might have said, "This survey is erroneous, because it differs from the decree"; but neither they nor the claimant could allege that it was wrong because it followed the decree.

We are not bound to prove that the construction given to the grant was right. Suppose it was a floating grant, the court below has conclusively determined that it is for a certain specific league of land. If the grant were utterly lost, if it were buried in the bosom of the ocean, if every witness that had ever seen it was dead, if all memory of it was extinguished from the face of the earth, we should still have a good title to that particular league of land, by virtue of the decree.

That decree not only stands in full force and unimpeachable, by virtue of its own inherent and essential force, but there is another reason why it can not be moved. This court pronounced exactly the same opinion, and gave the same construction to the grant that the court below did. You declared that there was no ambiguity about the grant, that the boundaries of the land were well-defined on three sides, and that the fourth line should be run for quantity. The decree of the court below, and the survey now under revision, both followed the decision here. Has the court the right now to go behind its own decision? I say, No. In Pennsylvania it has been held that the Supreme Court may reverse a judge of the Common Pleas, and then, when he follows the decision, reverse him again, and so on *loties quoties*, as often as the higher tribunal sees proper to change its mind. I maintain that a decision once pronounced by the court of last resort becomes the law of that case, and all courts, including the one which made it, are bound by it ever afterward, so far as that same case is concerned. I am glad to know that this rule is acknowledged in California. In the twentieth volume of "California Reports," *Lees vs. —*, is an opinion of which the reasoning is very conclusive, and the authorities full, to show that such is and ought to be the rule.

But suppose you are not technically bound by your decision, are you not morally bound to stand by it? Can this court, consistently with the obligation it owes to the country, go back and reverse a decision made by it six years ago, settling the title to a most valuable piece of property, and thus ruin thousands of men who have invested their capital, and their enterprise, and their industry, in purchases which they made upon the faith of that decision?

However that may be, is it, can it be, a debatable point that the parties to the decree in the District Court are bound by it, they and their privies? If it be thought necessary to prove that the decree is right, I can do that against all comers. If your honors think you have jurisdiction in this case to rejudge the justice that was administered between the same parties in another case, you will find that the construction given to the grant by the District Court was exactly what it ought to have been. It was not a floating grant any more than it was a floating decree. The land granted by the Mexican nation to *Justo Larios* is defined.

It can not be reasonably pretended that the lines described in the



grant are not the lines of the very tract which the Governor intended to be his property. His league of land was intended to be *colindante con la Sierra* on the south. Can that have any meaning but one? Upon that boundary his land must lie on that side, extending to the east as far as Berreyesa's line, and westward to the creek. Where, then, shall the north line run? Just so far north of the mountain as may be necessary to take in the requisite quantity. Let me illustrate. Suppose I have a lot of ground in the city of Philadelphia, containing forty perches, and extending in an oblong-square from Chestnut Street on the north to Walnut Street on the south. I sell to my neighbor twenty-five perches, and describe what I sell to him as being bounded "on the north by Chestnut Street, on the west by Ninth Street, on the east by an alley," and I say nothing about the fourth line, because I do not know precisely where it can be run so as to include the twenty-five perches. But I make that fourth line just as certain, by the limitation of quantity, as if I had described it upon the ground. Would you not say of such a contract what Judge Campbell said of the grant to Larios, "There is no ambiguity about it"? If my grantee, under such a contract, would insist upon a conveyance for the southern, or Walnut Street, end of the lot, would I not give him a conclusive answer when I would show him that Chestnut Street was the boundary by which he bought? Upon the other hand, if I, finding the Chestnut Street end of the lot to be the most valuable of the two, should insist upon his taking the other, and go into court with him upon the controversy, is it likely that I would find a member of the legal profession low enough to undertake my cause?

Again, suppose that Justo Larios had taken a grant from the Governor describing the subject-matter as a league of land bounded on the north by the Pueblo Hills, with two side lines on the east and west, but without any call for a south line, and then suppose that Larios, or his alienees, after the discovery of quicksilver in the hills, had determined to claim by the mountain as a southern boundary, and measure back between the side lines toward the north for quantity, would not such a claim be overwhelmed with contempt as soon as it was set up? Yet this is the very thing which our adversaries are contending that Larios has not only a right to do, but which they declare he is bound to do. They insist that he must abandon the boundary-line that is given to him upon the mountain, and the land which was granted to him, and go down to the Pueblo Hills, where he has no boundary, and take land to which he has no title.

If we can abandon the boundary that is assigned to us in the grant, and go northward to locate our tract elsewhere, how far may we go and what shall be the rule? There is nothing said in the grant about the Pueblo Hills. There is nothing there to stop us. The moment we cut loose from the mountain, we are launched out into unlimited



space ; we may go down\* to the bay, or beyond it, just as well ; the world is all before us where to choose ; and if they can drive us from the mountain, they can send us off for an indefinite distance.

But let us assume, *argumenti gratia*, that this was a floating grant ; concede all that has ever been averred by the other side upon that point : then Larios had a right to locate his land according to his own election, anywhere within the space that lies between the mountain and the fictitious north line assumed by our opponents. And has he not elected ? Who will deny that the survey is an election ? It is not only his election, but an election which he was assisted to make by the officers of the Government themselves. It was approved by the judicial tribunals to whom that subject was committed ; it was approved by the Surveyor-General, whose duty it was to mark the lines upon the ground ; it was approved by the Attorney-General, the law officer of the Government, whose function it was to make objections to it if any just or legal objection existed. He claimed his league of land upon the mountain, and so far down upon the plain as was necessary to take in the quantity, and left the land south of him to be used by the Government as it saw proper. The Government accepted what was assigned to it, surveyed it, and invited all persons who desired to settle upon it to come and take possession. Now the Attorney-General proposes to unsettle what he settled before, to change what was fixed by his own act. The effect (I do not say the design) would be to defraud those who have purchased from Fossatt since the election, and give his alienees no redress except what might consist in making reprisals upon the grantees of the Government who bought upon the faith of the same election. But the Attorney-General insists that we did not make our election properly. What right has he to say that now ? Why did he not tell us it was wrong when we were in the District Court together, for the very purpose of having the errors of it corrected ? What right has he now to complain, after his former silence has induced the expenditure of millions upon the faith of it ? It is impossible that he can believe it just or fair to make a *bouleversement* at this time of day.

Those who say that this was a case for election have impugned the election actually only on one ground : it does not cover the land sold by Laurencel, as the attorney of Fossatt, to Isaac Foster. I admit that where the owner of a floating grant sells out his right, and describes the location of it in his deed, neither he nor his grantee can properly or justly have it located in another place. That may often be true where a part, as well as the whole, has been sold. But the sale, in order to have any such effect, must imply not only an assertion of right to the land so sold, but a relinquishment of all claim to other land. Election means a choice between two things by a person who can not, and who knows he can not, have both. A man who has a title to



a certain specific piece of land, and who, mistaking his boundaries, makes a sale outside of them, is still safe in his original claim. By selling that which is not his, he does not forfeit what belongs to him. It is also another rule that, where several sales have been made, the final election must be consistent with the elder, and not with the later, sales.

Now look at this sale to Foster, and the other sales that have been made by Larios and his alienees. It was in 1853 that Foster bought a small piece of land near the creek. He had squatted there upon public land. Doubtless he had heard the big boasts of the New Almaden Company, that they would drive us from the hills down upon the plain. He thought it best to get a quit-claim deed. Laurencel, then acting as attorney for Fossatt, was willing to give him a conveyance of such right as his principal had, but refused to covenant against the title of the United States.

Now the Attorney-General is desperately concerned for Foster; his righteous soul is vexed from day to day for fear that Isaac Foster will suffer by the location which he consented to himself three years ago. He urges upon you the sufferings of Foster, though Foster himself implores him simply to let his business alone, and sends here one of the most distinguished counselors in the country, Mr. Johnson, to say that he is entirely satisfied, and to get him out of this business altogether.

But while the Attorney-General is thus sorely tried by his sympathy for Foster, his heart has no drop of pity in it for other persons, who bought the other end of the land long before Foster. Larios sold to Grove Cook in 1845, referring for his southern boundary to the grant which called for the mountain. Cook, in 1847, made open claim, and gave universal notice of his right to go to the mountain, by the survey which Snyder made for him upon the ground. In 1850 Cook sold to Wiggins, describing the southern boundary as being at the mountain. Wiggins mortgaged the land to two different persons, and again the description of the southern boundary was the mountain. Both mortgagees foreclosed upon him, and the decrees of foreclosure made by the County Court declared the mountain to be the boundary. By that boundary the land was sold at sheriff's sale, and Fossatt bought it. Fossatt sold one quarter of a league to the Guadalupe Mining Company, again by the mountain boundary. These vendees entered into possession by that boundary, expended large sums of money, and made valuable improvements. All these sales were made long before the quit-claim deed to Foster for his little piece down at the creek. It was before that time that Fossatt and the Guadalupe Mining Company both presented their claim to the Land Commission, and that claim was adjudicated in their favor, and the mountain assigned to them as a boundary.

But all these real sales on the northern side are ignored on account of the subsequent quit-claim deed to Foster. The millions for which the southern side sold are to count nothing. It is no harm to swindle the purchasers there, but it would be terrible if anything but good should happen to Isaac Foster. Will not the Attorney-General condescend to remember that Foster is begging him to let his business alone?

I suppose some reply is due to that part of the argument made by the assistant counsel of the United States, which has neither been directly repudiated nor expressly indorsed by the Attorney-General. The gentleman who made it appears to believe in it himself, for he uttered it with all the ardor of conviction.

It is a most wonderful thing, a phenomenon such as I have never seen in a court of justice before, that any counselor should undertake to reverse and totally change a decree from which the party he represents has taken no appeal, and upon grounds which were not made known in the court below. Mr. Wills must have overlooked that part of the record which shows that the United States took no appeal in this case. It can not be possible that he did not know the rule of law which makes an appeal indispensably necessary to such a purpose. He is not a very young man; he has had many opportunities of learning that simple and well-defined truth. Indeed, it has been decided several times during this very term, in cases where he himself was concerned for the United States. He must have supposed that the United States did take an appeal. That is the only explanation that can be given of his conduct. When I correct him upon that matter of fact, I have given a sufficient answer to all that he has said about the decree.

He not only opposes the decree now under review, but he denounces everything that has been done in the case, from its beginning to the present time. He declares, in substance, that everybody who has ever been engaged in this cause; all the counselors concerned in it at every period of the litigation; all the judges who have ever examined it; all the surveyors who have ever gone upon the ground—misunderstood the whole subject entirely. He, and he alone, has comprehended the case rightly, and practically applied to it the true principles. He has surrounded the subject, he says, after the manner of a circular hunt, and driven everything before him in toward the center from every part of the circumference. We, says he, take our stand upon the *loma* in the center of the valley, and we dissipate all the fogs, and clouds, and darkness, like the blaze of the noonday sun. We may admit this remarkable superiority of his, and still fairly object to its exhibition now. We ought to have had the benefit of this luminous exposition while it was yet possible to walk by it. If the Attorney-General had an assistant counselor who was capable of being to this



subject what the sun is to the universe, he ought to have mounted him on that *lomita*, and set him to blazing there a good while ago. It is cruel, at this late hour, to burst upon us with this overpowering splendor, only for the purpose of showing that we are ruined past recall. He should not have hid his candle under a bushel, or, rather, he should not have closed the sun up in a dark-lantern, for all this length of time, and left us to grope about in darkness and in ignorance.

Mr. Wills asserts that his demonstration is perfectly complete; he has settled the whole affair as nobody else ever thought of settling it before, and nothing remains for the court to do but to order an entire new set of surveys to be made. And how? "According to the conclusions of this argument," says he. You are invited, as I understand him, to put his argument into the mandate, and send it down to the Surveyor-General, with orders to make a survey accordingly.

I beg leave to express my doubts about this. With much deference I submit to the court the question whether it is not just as likely that Mr. Wills is mistaken as it is that everybody else has been blundering for the last fifteen years. I will examine what he calls his three "*leading propositions*," which he thinks he has so completely demonstrated. But, before I do that, you will allow me to show what his ideas of a demonstration are.

By the Larios *diseno* the Sierra del Encino is delineated on the southern side of the tract, and the Pueblo Hills on the northern; the Lomas Bajos are not laid down at all. What is meant in the nomenclature of that country by the Sierra del Encino can not be a subject of the smallest doubt. The great oak-tree on the side of the main elevation proves itself. When Larios called the mountain depicted on his map by the name of Sierra del Encino it was impossible to say that he meant the low hills, which were never called by that name. He meant the mountain, and he said so in writing on the *diseno* itself. But Mr. Wills thinks he has demonstrated the fact to be otherwise. And such a demonstration! He took, in your presence, the two *disenos* of Larios and Berreyesa and put them together, and by a little pulling and hauling could make the Sierra del Encino on one map nearly fit to Lomas Bajos on the other. Now, if two adjoining tracts of land were both carefully measured by the same person, and with the same instruments, and a map of both made upon the same scale, you would expect the different parts to fit one another, but otherwise you would not, and could not, expect any such thing. These two tracts were never measured at all. The maps were made without measurement, by different persons, without concert between them, and without the slightest reference in either to any kind of scale or proportion. The chances that an object delineated upon both would be laid down at places exactly corresponding, do not amount

to one in a million. Yet this has been called a demonstration ! Now, let us look at the other demonstrations.

He says that in this case the petition, as well as the grant, was for the valley, and the valley extends to the foot of the low hills ; that is the natural boundary of the valley ; and the natural boundary of the valley is the legal boundary of the grant : *ergo*, our limit must be the foot of the low hills, and not the mountain, where we have proved that our line runs. These facts are not true ; but pass that and look at the logic. The proposition means, if it means anything, that the name by which a ranch is called in the grant ought to determine its limits, and not the lines which are expressly given as boundary-lines. Let me show you how such a rule would work.

All the grants in California, or nearly all, have names. These names are selected arbitrarily, and very often without any regard to the fitness of things. One person calls his *ranch* by Spanish words which signify "a willow grove," because there are willows on a few acres of it at one corner. According to this new doctrine he can take nothing but the willows, though his lines may include a hundred times as much. Another has a tract that is called "Los Picos," because there are several sharp hills in the center. Shall he be held to the tops of the hills ? Another is named "Isla de Santa Rosa," because a river runs through the tract, and in the river is a little island called "Santa Rosa" ; but the tract itself is five or six leagues in extent, while the island contains not more than three or four acres. An unfortunate gentleman is the owner of a grant named in the title-papers "Rio de los Americanos." Measuring it by the lines given in the grant, it extends along the bank of the American River four leagues, and has a depth of two leagues. To this he is entitled, if the calls of the grant prevail ; but, if the name that the Governor called it by is the only standard, then the bed of the river is all he can take.

But the *reductio ad absurdum* is furnished in this very case. The grant issued to Berreyesa is named "Canada de los Capitancillos." The grant to Larios is for "Los Capitancillos." Berreyesa must, therefore, have the valley of the Little Captains, while Larios can take nothing but the Little Captains themselves. The natural boundaries of the two little Indians are the legal boundaries of his grant, and he can have no more !

It is a waste of words to spend them in refuting such a "demonstration" as that. It is enough to answer it by simply saying that we claim according to our line. The counselors, and the judges, and the surveyors, who have considered this case so long and so carefully, have not been mistaken in supposing that to be the true rule. The United States, speaking by the mouth of their own Attorney-General, here in your presence, have declared that the calls of the grant must govern. You will not, I trust, forget the plain and unequivocal admission to



that effect made by Mr. Bates, which puts him in direct conflict with his assistant counselor.

The gentleman has another demonstration. He says there ought to be such a survey made here that those who were *colindantes* under the Mexican Government will continue *colindantes* under the American Government. If he means by this to say that we must go upon all sides of our tract, to those places and things which the grant calls for as our *colindantes*, I admit it, of course. It is for that reason that the mountain is our southern boundary, Berreyesa's line the eastern, and the creek the western. But his application of the principle seems to be that we ought to leave our *colindantes* on the south, east, and west, and go northward to find a boundary which the grant does not mention. A man named Bernal has a grant on the northern side of the Pueblo Hills, concerning which the *expediente*, the grant, and all our title-papers are profoundly silent. Mr. Wills thinks we should manage to lay our tract next to his, which is not called for, at the expense of taking it miles away from the other boundaries, which are called for.

Another of his "leading propositions" is that these surveys, both of Berreyesa and Larios, should be laid out in rectangular parallelograms; all the sides should be straight, and all the corners should be right angles. I answer, that if the calls of the grant are for rectangular parallelograms, it ought to be laid out so; but, if one of our lines lies along the foot of the mountain, and the mountain is crooked, we can not remove the mountain; or, if it be a creek, it must be remembered that streams of water, in all countries, will meander.

The honor of the United States is deeply concerned in this case. The land we are claiming never belonged to this Government. It was private property, under a grant made long before our war with Mexico. When the treaty of Guadalupe Hidalgo came to be ratified—at the very moment when Mexico was feeling the sorest pressure that could be applied to her by the force of our armies and the diplomacy of our statesmen—she utterly refused to cede her public property in California unless upon the express condition that all private titles should be faithfully protected. We made the promise. The gentleman sits on that bench who was then our minister there. With his own right hand he pledged the sacred honor of this nation that the United States would stand over the grantees of Mexico and keep them safe in the enjoyment of their property. The pledge was, not only that the Government itself would abstain from all disturbance of them, but that every blow aimed at their rights, come from what quarter it might, should be caught upon the broad shield of our blessed Constitution and our equal laws.

It was by this assurance, thus solemnly given, that we won the

reluctant consent of Mexico to part with California. It gave us a domain of more than imperial grandeur. Besides the vast extent of that country, it has natural advantages such as no other can boast. Its valleys teem with unbounded fertility, and its mountains are filled with inexhaustible treasures of mineral wealth. The navigable rivers run hundreds of miles into the interior, and the coast is indented with the most capacious harbors in the world. The climate is more healthful than any other on the globe. Men can labor longer with less fatigue; the vegetation is more vigorous, and the products more abundant; the face of the earth is more varied, and the sky bends over it with a lovelier blue. Everything in it is made upon a scale of magnificence which a man living in such a commonplace region as ours can scarcely dream of—

“ . . . which his eye must see  
To know how beautiful this world can be.”

That was what we gained by the promise to protect men in the situation of *Justo Larios*, their children, their alienees, and others deriving title through them. To let them be plundered in the face of such a pledge would be the last point to which human baseness could go.

How would such a story as this sound in the ears of the world? The United States obtained unlimited wealth by promising to protect private property under Mexican grants. The protection was claimed by a grantee whose land was more than commonly valuable. He produced his title, and all the public officers admitted it to be genuine, honest, and valid. A captious objection was raised to his boundaries; but he met it by proof so simple and clear that he confounded all opposition. Witness after witness testified in his favor, and not one against him. Survey after survey defined his limits with mathematical precision, and no man could be found ingenious enough to make any other. Decree after decree, to the number of nine, pronounced his right to be incontestable. At length the chief law officer of the Government interposed his authority to stop this persecution, by declaring that no further objection should be made, and no more appeals should be taken. The title thus proved, thus adjudicated, thus acknowledged, passed rapidly from hand to hand, the price increasing at every transfer, until it swelled into millions. But, six years after the last decree, and three years after the Attorney-General had decided in favor of the title, that same Attorney-General came into the Supreme Court, without an appeal from the court of original jurisdiction, and demanded that this same property should be taken for public use, upon grounds which the owners had never been allowed the chance of disproving.

To suppose it possible that your honors might accede to this un-



lawful and unjust request would be inconsistent with the respect due to the court. But I can *imagine* how such a sentence would shock the moral sense of the world. It would be an act of such gross and shameless perfidy as never blackened the brow of any nation before.

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PEIRCE *vs.* THE UNITED STATES. (FLOYD ACCEPTANCES.)

SUPREME COURT OF THE UNITED STATES.

THESE claimants have been treated hardly and harshly, even if their right had been doubtful, which it is not. They were refused payment at the War Department, and no reason was given. Congress declined to interfere, though a committee of the Senate reported in their favor; and, what was still worse, they were compelled to see their case mutilated and disfigured by the Court of Claims.

It is now to be determined just like a cause between two private parties. When the sovereign comes into a court he submits his rights to the same test that would be applied to those of anybody else. The rules of pleading and evidence are the same; the means of ascertaining the truth are the same, and the truth, when it is ascertained, has precisely the same effect and operation. In a case remarkably similar to this, tried before Judge Baldwin, in the Circuit Court, it was suggested to him that he ought to look to the interests of the United States. He seemed to resent it; he sat there not to take care of anybody's *interests*, public or private, but to adjudicate upon the *rights* of two litigant parties; both were entitled to justice; neither of them to favor. In the *United States vs. The Bank of the Metropolis*, this court unanimously declared that, when the United States became parties to negotiable paper, they acquired precisely the same rights, and subjected themselves to the same liabilities, as a private party. The judges of that time, all of them, declared that they knew of no difference, except that the United States could not be sued. But now they can be sued. The only difference that ever did exist is abolished by the act of Congress which gives the jurisdiction you are now exercising.

If this were a case between two individuals, would there be any doubt about it? The rules of commercial law, which define the rights and obligations of parties to a bill of exchange, are the simplest part of our jurisprudence. They are founded on the principles of common honesty, which every man is bound to observe at his peril, and which no man can violate without being conscious that he has done wrong. They are so reasonable and natural that they are the same all over the world. They are understood alike, not merely by judges and

lawyers, but by all business men of common capacity ; and so well understood that, though papers of this kind are made every day, by thousands and tens of thousands, and hundreds of thousands of them are constantly in circulation, there is not a dispute about them in one case out of a million.

According to these rules, it can not be denied that, if the United States accepted the bills now in suit by an officer who, at the time he did so, was acting within the scope of his legal authority, such acceptance was a contract by the Government to pay the bills to the holder, at maturity, without delay or defalcation. If the paper, after acceptance, and before maturity, was taken by a *bona-fide* holder for a valuable consideration, the contract was absolute and indefeasible. If the holders had such notice as took away from their purchase the quality of good faith, then they have it subject to all the equities existing between the original parties. But, in either case, or in any case, the acceptance itself raises a presumption that it was given for a good consideration ; that the consideration has not failed, and that the acceptors had in their hands, at the maturity of the bills, funds of the drawees sufficient to pay it. In favor of a holder, *without notice*, this presumption is *conclusive* ; in favor of a holder, *with notice*, it is still strong and *powerful*, so that it can be repelled only by clear and cogent proof that the fact is otherwise. The acceptor of a bill is bound like the maker of a promissory note, and neither of them can be relieved from the legal liability, except upon grounds which would justify a chancellor in decreeing the cancellation of a bond.

We can not argue the question whether these are bills of exchange or not. It is denied on the authority of the Bank of the United States *vs.* United States (2 Howard, 711). It being decided, in 15 Peters, that a paper exactly like this was a bill of exchange, it is certainly not a matter of much consequence that the court has determined, in another case, that another paper, of a different form, is *not* a bill of exchange.

There are, therefore—there can be—only three questions in this cause :

1. Did the United States accept these bills ?
2. Are the claimants holders of them in good faith ?
3. Have the United States shown any equitable defense ?

Whether the United States accepted the paper, depends upon the power of the Secretary of War to accept it for them, and on their behalf. If he had no authority, the Government is not a party to the bills ; the acceptances are not evidence of any legal liability ; they are mere nullities, and no negotiation of them, whether with or without notice, could give them any validity whatever, as against the United States.

But what kind of authority must we show ? Certainly not express



and special authority to accept these very bills *nominatim*. It is enough, if it appear to your satisfaction, that the Secretary had a *general authority, which comprehended an act like this* within its limits.

This proposition is so plain that I would waste no time upon it, if its importance had not been magnified by the court below and by the counsel on the other side. They make it the turning-point of the case. Without denying, in direct and explicit terms, that a secretary has authority to accept the bill of a contractor for army supplies, they insist that, *under the circumstances of this particular case*, Mr. Floyd had no power to accept the bills of Russell, Majors, and Waddell, which are now in suit, and *therefore these acceptances are null and void*. In other words, they hold that the legal validity of any official act depends, not on the authority of the officer who did it, but upon the *propriety of its exercise*, in the case under consideration. According to this view, any contract of the Government, though made by an officer having full authority, may be set aside, if his successor shall be of opinion that it ought not to have been made at that time, upon that occasion, or with that person. Nay, he may do more: he may declare it null and void *ab initio*, at whatever expense of loss or injury to the other contracting party, or to third persons who have, in good faith, acquired an interest in it.

We maintain that the Secretary had authority to do an act like this upon which we base our claim; that this act is valid and binding, the act of the Secretary being the act of the Government; and it is no matter whether he exercised the power well or ill, properly or improperly, lawfully or unlawfully. We deny that the power was abused in this case; but if it was, then the Government which gave him the power must suffer for his misconduct.

Inasmuch as the defense seems to rest entirely upon this point, I may be allowed to pursue the subject somewhat further than might otherwise seem to be necessary.

The rule, as you know very well, is laid down in all the books, and in all the adjudicated cases, and always in the same form of words, that a principal is bound by the acts of his agent *within the general scope of his authority*. Whether he has been true or not to the interests of his principal is a question exclusively between themselves. So it is, and must be, with respect to those public agents who derive their authority from the law. If you bestow upon any person power to do a thing, and then make a law restraining him in the exercise of that power, and he breaks through the restraining law without transcending the limits of his authority, his act is as valid as if done in the proper exercise of his authority. In short, it is not sufficient to invalidate any official act that it was an abuse of power. To make it void, it must be shown to be—*ultra vires*—a usurpation, or an attempt to usurp a power which did not belong to him at all. The Court of



Claims had authority to decide all cases of the class to which this one belonged ; but it was wholly unlawful and improper for them to determine this case, as they did, in the teeth of the evidence ; nevertheless, we can not for that reason show their decree to be void. Many a judge, and many an executive officer, has done acts for which he ought to be impeached, or otherwise punished, as a criminal ; but those acts, which were criminal in him, were nevertheless binding upon the public, and the parties interested in their validity.

A cashier of a bank has, and must necessarily have, the power to bind the corporation by making it a party to negotiable paper. But suppose a provision in the charter and by-laws forbids any officer of the bank to accept a bill or draft, payable in the future, unless the drawer, at the date of the acceptance, had cash funds in the bank sufficient to meet it ; and the cashier, overlooking or disregarding that prohibition, accepts such a bill from a drawer who has no money, but who gives collateral security sufficient, in the opinion of the cashier, to make the bank safe. The bill so accepted goes into circulation, and at maturity it comes back to the counter of the bank in the hands of a *bona-fide* holder, with a demand for payment. Can the bank set up the illegal acts of its officer, which are its own acts, and declare the paper to be void on that account ? No, certainly. The holder of the bill must be paid ; and if the bank loses by the transaction, its remedy is against the officer who abused his trust.

You have applied this principle, with inflexible severity, to acts done by the officers of public as well as private corporations. The case which I thought the hardest at the time was that of *Curtis vs. The County of Butler*. That was a suit upon county bonds issued by the commissioners to a railroad company. After a close and careful examination, you held that the act of the Legislature did give to the commissioners power to make and issue negotiable bonds, with coupons attached for the interest. But the commissioners grossly violated the law which should have regulated them in the performance of their duty. They handed over the bonds to a bogus railroad company without receiving a cent of consideration, and the people of the county were most inhumanly swindled—saddled with a debt which it then seemed impossible for them to pay without a tax amounting almost to confiscation of their property. But there was no relief. What they complained of was the unlawful exercise, by their own officers, of a power which they themselves had bestowed upon them. The thorns that tore them grew upon the tree they planted.

In *Woods vs. Lawrence County*, and *Kennett vs. Mercer County*, you repeated the same doctrine in language still stronger. There the very same law which authorized the commissioners to make the bonds commanded and enjoined them not to exercise the authority until the grand jury should do certain things, which the grand jury never did.



But you regarded this as a mere circumstance. You declared that you would presume all circumstances that were necessary to make the exercise of the power effectual, and, for the purpose of sustaining the legal validity of negotiable paper in the hands of a *bona-fide* holder, you would make that presumption conclusive. The principle was reasserted in *Gelpcke vs. City of Muscatine*, and in another case which came up from Indiana, in which the city of Madison was a defendant.

You have seen the inside of many cases where the contest was upon the validity of bonds given by municipal corporations to railroad and other improvement companies; and I think you know that not one in twenty of those securities would stand the test of an inquisition into the special circumstances attending every particular case. The application to them of the doctrine laid down by the Court of Claims would make them nearly all as worthless as so much waste-paper.

I submit, also, that the rule contended for on the other side would be very uncomfortable to the bondholders of the United States. Those securities are now scattered all over Europe and America, in the hands of men who know literally nothing about the *circumstances* under which they were issued. They were taken and paid for upon an understanding, distinct and universal, that the purchaser was bound to make no inquiry, except whether they were made and attested by officers who had a legal authority to pledge the faith of the United States for their payment. Are you willing now to say that their value depends upon *circumstances*? Are they worthless and void if it can not be shown that they were issued at the right time, to the right man, under the proper circumstances, and for a full consideration? If one of those bonds was given in payment of a pre-existing debt, must the holder be able to show that the debt was just and proper? If they were sold in the open market, must he be prepared to prove that the agent was legally appointed, that he sold the bonds for a full price, and made return to the treasury of every cent he got? Perhaps you may think that even by that rule there are no circumstances which will justify the repudiation of the bonds. But can you safely leave them to the mercy of a future administration, which may have a very different opinion about the circumstances in which our public debt had its origin? Ten years hereafter you may have a Court of Claims just as anxious to repudiate the obligations of this administration as the present Court of Claims is to repudiate those of a former administration. Ten years hence you may have an Attorney-General who will be a repudiator as much worse than the present Attorney-General as he is worse than the person who held that office ten years ago. Such an officer would seize upon any *circumstance* to bring on a conflict between the Government and its creditors.

Of course, there can be nothing wrong about that portion of the debt which was created by the War Department under the adminis-



tration of Mr. Holt, Mr. Cameron, and Mr. Stanton. Their passionate devotion to the strict letter of the law is very well known. We are, therefore, driven to one of the other departments to find even an imaginary case to illustrate our principle. The Secretary of the Interior is authorized by act of Congress to issue certain bonds for the use of the Union Pacific Railroad Company; but he is commanded not to do so until a certain amount of work has been done upon the road. Suppose the Secretary of the Interior willfully or ignorantly issues the bonds prematurely, and before the required amount of work has been done. He has exercised his power unlawfully. But would my learned friend advise the Government, whose counselor he is, to repudiate those bonds, and declare them void, *under the circumstances*? No, he would say, "Impeach your officer, indict him, or sue him for the loss—do anything but cheat and ruin the innocent holder by jumping '*a circumstance*' upon him of which he knew nothing until after he had parted with his money."

Your honors, as well as the Attorney-General, will recollect the repudiation of the Mississippi bonds. The State had given to its officers the power which they exercised when they made the bonds, and pledged the faith and honor of the State for the payment of them. They appointed commissioners to negotiate them, and by those commissioners they were actually negotiated. But they violated certain laws which they ought to have observed, and consequently the State did not receive the consideration which had been contemplated and required. The State repudiated them, and attempted to justify herself "*under the circumstances*." I defy the Attorney-General to show any difference, in principle, between that repudiation and this. It is the same precisely. No doubt, he has read the message of Governor McNutt, and he must be conscious that any argument which he is able to make for the United States in this case is a mere reproduction of the arguments set forth in that message to vindicate the Mississippi fraud. And he must know that we are standing upon the very ground which the whole world took when the thunders of its condemnation blasted the character of that State forever, and left it to stand through all time a scorched and blackened monument of shame. The judicial authorities of Mississippi herself—the Supreme Court of that State, whose venerable chief-justice is now seated in your presence—decided that this attempt to get rid of the bonds by pleading "*circumstances*" was a mere swindle. But Governor McNutt had one signal advantage over our learned opponents in this case. Some of the holders of the Mississippi bonds were Jews, and the Governor took high religious grounds against them. He insisted that no sympathy was due them, even if they were betrayed and plundered, because they had the blood of Judas and of Shylock in their veins. On theological, if not on legal grounds, he had them tight enough. But for aught that appears



in this case, Mr. Peirce, and Governor Morgan, and the sempstresses, and the widows, and the washerwomen, and the little boys who deposit their half-dimes in the Dover Savings Bank, may be as good Christians as those gentlemen in the War Department who are trying to cheat them out of their earnings.

But we have a decision of this court perfectly decisive. The *United States vs. The Bank of Metropolis* is this case in every point and circumstance. The form of the paper there was the same as this; the relation of the drawer to the Government was the same; the power and position of the officer who accepted the bill was the same; and every circumstance alleged in this case, whether truly or falsely, was actually present there. Porter was a contractor; he drew upon the Post-Office Department, which had the supervision of his accounts; his bill was accepted to accommodate him and enable him to perform his contract, though at the date of the acceptance nothing was due him. What is worse, the earnings under his contract did not cover the bill while it was running. This court held the paper to be a bill of exchange; that the United States became parties to it by the acceptance, and were liable, like any other acceptor, and that, if discounted in good faith, they were bound to pay it to the holder at maturity, without regard to the state of the drawer's accounts.

There is another case also directly in point. The *United States vs. Reeside*, determined in the Circuit Court, but not reported except in a Congressional document. In 1835 Mr. Barry, the Postmaster-General, determined to have more money for his department than Congress was willing to appropriate. To make a raise he resorted to a system of "kite-flying" with General Reeside, who was one of his principal contractors. At his request, Reeside drew a long series of bills, precisely in the form of these bills now before you, which Mr. Barry accepted and put into the hands of his agents, who took them to Philadelphia and New York, where they were sold for whatever they would fetch. The whole transaction was fictitious. The paper was got up for the accommodation of the department. It was the exercise of a power which belonged to the Postmaster-General as the head of a department, but it was, no doubt, a flagrant abuse of his authority. When it was discovered, Mr. Barry was driven from office and fled to Kentucky, with the wrath of the whole population burning after him. Mr. Kendall became his successor. He repudiated the bills, not because there was no power to accept them (for he himself did the same thing), but because, in his opinion, they ought not to have been accepted *under the circumstances*. He stated an account between the United States and Reeside, and brought him in debt \$32,000. On this balance a suit was brought in the Circuit Court of the United States at Philadelphia, where it was tried before Judge Baldwin in 1841. In the mean time Reeside had been compelled, as



the drawer and indorser of the bills, to take up a large number of them, and he had them in his hands at the time of trial. He produced them as offsets, and they were allowed, not only to an extent that covered the claim against him, but the jury found a verdict in his favor for \$188,000, which was afterward paid under an act of Congress. Judge Baldwin instructed the jury that these were bills of exchange, and, being accepted by the head of the department which had the supervision of the drawer's account, they were binding upon the United States; that the authority given to the heads of the several departments ought always to be exercised for the public good, but if it was perverted so as to be injurious to the United States, they must look to their officer for redress; they could not indemnify themselves by making reprisals upon other parties who had trusted their officers only to the extent that the United States themselves had proclaimed to the world that they might be trusted. This must be the rule. If it be not, then this Government is a mere machine to swindle the people, and all its officers, without going outside of their authority, may exercise it so as to commit a fraud of which the lowest confidence-man at a mock auction would be ashamed.

But, while I contend for this rule, I do not admit that there was anything wrong in the exercise of Mr. Floyd's authority. He violated no law; he disregarded no duty which he owed to the Government. They say that the acceptance of these bills was in conflict with the acts of 1823, 1846, and 1853. The slightest glance at these acts will thoroughly satisfy you that this whole transaction goes perfectly clear of all collision with these statutes, or any of them.

It is not pretended that the acceptances were given for any corrupt reason, or that there was any fraudulent collusion between him and the drawer to make the United States pay more money than they ought. The Court of Claims, indeed, has paraded in its finding the misconduct of Russell and Bailey concerning certain bonds held in trust for the Indians; but that has no connection whatever with these acceptances, with the War Department, or with Floyd, still less with the claimants. It took place long after the present holders of the bills had paid for them a full price in good faith. If the counsel of the United States had undertaken to make a special answer to our petition, setting forth their whole defense circumstantially, and this affair between Bailey and Russell had been inserted in such an answer, there is no court on earth, having the remotest idea of its duty, that would not instantly have stricken it out as a mere piece of impertinent scandal. But the judges of the Court of Claims were so eager to defeat the rights of the claimants, by throwing odium upon the case, that they reached out over the case and dragged this business in by the head and shoulders. If they thought that by such means they could commend their decree to your favor, or increase the chances of its affirmance,



they must have put an exceedingly low estimate upon your understanding.

Thus far I have rather assumed the existence of the power. We were bound to satisfy you, not only that it does exist, but that this act falls within its limits. For we claim no unlimited authority over the purse or the sword of the nation for any officer of this Government. We deny utterly the extravagant doctrine imputed to us, that any head of any department may accept any bill drawn by anybody for any amount, and bind the United States to the payment of it. What, then, is the limitation? I do not undertake to define the outside boundaries. It is not necessary that I should. But I think I can draw what the land-surveyors would call *the interior lines*. I do it thus: Whenever any subordinate officer, agent, or contractor has a running account with the United States, he may draw a bill upon that department of the Government which has the administrative supervision of his accounts, and when such a bill is presented to the head of that department it becomes his duty to determine whether it shall be accepted or refused, and his decision is binding. The power to supervise the accounts, to determine what shall be charged against them, and what not, and to pay what is found due upon them, implies and includes within it the right to accept a bill drawn against that account. To this extent the power is established by executive practice, by legislative sanction, and by judicial decision. Narrower limits than that you can not assign to it without denying altogether the existence of the power.

It has been denied, and that denial is based upon the fact that no act of Congress, expressly and in so many words, gives it to the head of any of the departments. But it is given in a score of statutes, by implication as clear as any words can make it. Where a power is given or a duty enjoined upon any public officer, without prescribing the mode of its execution, the choice of means is left to the officer himself. Certainly it can not be said that he usurps a power when he uses only those means which are reasonably proper to accomplish the end of the law. This, of course, will not be denied. Are there no functions assigned to the heads of the departments which make the use of negotiable paper necessary to carry them into effect? Let us see.

The chief officers of the departments are the direct and immediate representatives of the supreme Executive Magistrate. What he does he does by their agency, and what they do is deemed and taken to be done by him. All of them have more or less to do with the fiscal affairs of the nation. All of them are engaged, directly or indirectly, in the collection and disbursement of the public revenue, which now amounts to \$500,000,000 per annum. Their financial operations extend to every part of the habitable globe. There is no commercial port or political metropolis in the world where they have not impor-



tant pecuniary interests of the United States to take care of. They are engaged all the time in adjusting balances and settling accounts of persons who live at very great distances from the center of their operations. They buy and sell, and make all kinds of commodities, great and small, provinces and pumpkin-seeds. They bargain with all grades and ranks of persons, at home and abroad, from the Autocrat of all the Russias down to the menial that sweeps out the offices and shakes the carpets. They perform all the functions of merchants, manufacturers, and bankers, and carry on all other kinds of business that can be done by money. And this they do, not occasionally and in a small way, but constantly, and on a scale of magnificent grandeur. How is all this multifarious business to be accomplished? A method of doing it by bills of exchange was invented by the Jews of Lombardy in the fourteenth century, which, when tried, was found to be so safe, convenient, easy, and rapid that it was immediately adopted, not only by all the governments of the civilized world, but by all private persons who had considerable sums of money to handle. It was ascertained that a given sum, lying perfectly quiet in the vaults of a bank, or the coffers of a public treasury, would do twenty times as much business as could be done with the same amount in the same time on the old system of *toting* it about from place to place, and putting it into the manual possession of every one who acquired a right to it. It avoided the dangers as well as the delays of the old system. The commerce of the world, which had previously toiled along slowly, through the perils of the sea and the perils of the land, was set to flying high above all obstacles and all impediments, and the wings it mounted upon were made of these little slips of paper. If that invention had been patented, so that the United States could not use it without paying for it, they could afford to give twenty-five per cent of their income for the privilege rather than go back to the cumbrous system of the Middle Ages, and encounter all the risks and expense which that would produce. But they tell us, on the other side, that the officers of this Government, in conducting the public business, shall not use the means which everybody else uses in all similar business. This is not less absurd than it would be to say that, when the War Department is required by law to move troops, provisions, and military stores from one part of the country to another, over a route where railroads and steamboats have superseded all other modes of conveyance, railroads and steamboats shall not be used, because there is no act of Congress which expressly authorizes it.

Nothing like this ever entered into the minds of the great men who organized this Government and settled its practice. In the golden age of the Republic, when its departments were under the control of men who studiously abstained from the use of any power which was in the least doubtful, this authority was taken and used without a suspicion



that they were guilty of usurpation. All the predecessors of my learned friend, in the office of Attorney-General, have taken it as a postulate, reasoning from it and not to it. Congress stood by for eighty years and saw it exercised—gave it not only the sanction implied by their silence, but many times they indorsed it with their express approval, by making specific appropriations for the payment of debts which had been contracted in no other way, and of which there was no other proof.

But, over all and above all, this court expressly, positively, and directly adjudicated not only that such a power existed, but that it was practiced daily and inevitably, and that the United States had a deeper interest than anybody else in maintaining the rules which gave credit and currency to that kind of paper. I take it for granted that you will look that decision directly in the face, and meet it with the candor and the fairness which always has, which does now, and which always will, characterize the judicial mind of a great nation like this. It is utterly impossible to deduce from it any other rule than this: *That where a contractor under the United States draws a bill upon that department of the Government which has the administrative supervision of his accounts, and the bill is accepted by the head of the department, the United States become thereby bound to pay it, at maturity, just as a private party would be bound to pay a bill accepted by himself or by his authorized agent.*

There are only two ways in which you can treat that case. One is to make it decisive of the point under consideration. The other is to overthrow it and sweep it out of your path, because it stands in the way of your inclination to repudiate this debt. The latter course is one which you will be prevented from taking by certain considerations which lie outside of this cause and outside of this subject, vast as it is. They concern the stability of the law itself, and the confidence which is and ought to be reposed in this court as the organ and expounder of the law. If you pay no respect to the decisions of your predecessors, those who come after you will pay no respect to yours, and then we shall have no law, or as good as none, for it will change every time it passes through the courts—depending upon the temper and the caprice of the judges. Those sacred rules of property which ought to be as firm as the foundations of the everlasting hills, will become as unstable as water. The law will be anything and everything, and nothing at all, according to the revolution and turn of time—the *jus ragum aut inconditum*, which all men allow to be the most intolerable scourge that ever afflicted any people. That is what Jeremy Bentham calls "*dog law*," because the subject of it can never know what it is, until he feels the club of his master upon his head to punish him for some unconscious violation of it.

If you could believe that the case I refer to was decided errone-

ously—that the case was wrong upon original principles—yet, when you reflect that it was founded upon a daily and inevitable practice then fifty years old; that it has been followed by a similar practice ever since; that the principle of it has become woven into the public and private business of the country; that rights have grown up under it, which it would be utterly unjust and cruel to extirpate now, you would sustain it, if there was no other way, upon the principle that *communis error facit jus*. For error itself ceases to be erroneous, after it has been practiced for a long time with the sanction of the public authorities, and all the people have learned to adjust their business to it.

If you reverse that judgment, what are you to say about it? You tell the world that it has stood for twenty-five years like an open man-trap in the public highway, baited with Government paper; at last it has become full of innocent victims against whom the War Department happens to have a grudge, and it may be sprung upon them to their ruin and destruction. The decision that you substitute in the place of it will be another trap, baited in the same way, until some other obnoxious individual happens to put his foot into it, and he will suffer as these men, women, and children are expected to suffer now. This disregard of precedent will, of course, extend to other cases upon other subjects, and thus your whole system of jurisprudence, instead of being what it ought to be—a protection to the rights of men—will be a mere delusion and a snare in which nobody can have any confidence.

Every judge who sat upon the bench when that decision was made has gone to his reward. They are all dead. Has the law, as they settled it, died with them? And are the decisions that you make to be buried in your graves also?

I do not say this because I have allowed myself for one moment to believe that you are capable of pronouncing a judgment which will punish these claimants by defrauding them for the sin of relying upon a solemn decision of your predecessors. This court has gone further than any court in the world in support of the principle of *stare decisis* as the great sheet-anchor of the law. You have held that, where a contract has been made, which was valid according to the law as expounded by the judicial authorities at the time it was made, it can not be set aside, or its obligations impaired, by any subsequent change of the judicial mind. We demand the protection of that principle, and we expect to receive it.

I do not deny that the United States may, like an individual acceptor, make an equitable defense, unless, indeed, the bill has passed beyond the reach of equity, by going into the hands of a *bona-fide* holder who has paid for it. This brings me to the question of notice, of which I propose to say very little.



It is admitted that Mr. Morgan and the two banks are holders in good faith ; but it is asserted that Mr. Peirce had notice. The alleged notice consisted in a declaration made to him by Mr. Floyd, in which he assured him that he had accepted these bills, that he had authority to do so, that there was consideration for them, and that Mr. Peirce would be perfectly safe in taking them. He proceeded to show that the authority had been exercised prudently and cautiously, the acceptance being given only for about forty or fifty per cent of the money which would be due to the drawers when they delivered the goods then actually *in transitu*. He concluded by pronouncing these the best public securities extant, because the money to pay them was already appropriated by Congress. Mr. Peirce, understanding this just as any other sensible man must have understood it, took the bills, paying for them an outside price. He never dreamed that any tribunal in the world, judicial or *quasi-judicial*, would require him to understand the words that he had heard in a sense directly opposite to their natural meaning. But the solemn assurance that they were *all right* was ruled by the court below to be notice that they were *all wrong* !

We have no right to anticipate that the counsel for the Government will attempt to sustain a ruling like this. But the effect of it practically was, not only to permit, but to invite, the War Department to exhibit the state of the drawers' accounts.

If the earnings of the drawers upon their contract, while the bills were running to maturity, were sufficient to cover the amount of the acceptances, payment to the holders can not be honestly refused. To this part of the case I would ask your careful attention, because here you must mark out the moral ground which these parties respectively occupy. Where the holder and the acceptor of a bill are placed in such a situation that one or the other must lose the sum in controversy, neither of them can be blamed for making a fair struggle to throw the loss upon the other. But where the acceptor has the money of the drawer in his hands, or security for it, and attempts to shuffle out of his liability by concealing the truth, such a man is guilty of loathsome dishonesty.

I need not repeat what I have said already, that the acceptance does *ipso facto* raise a presumption that the acceptor had funds applicable to the payment of the bill, and which, in conscience and in honor, he ought to apply to it. Have the United States repelled that presumption ? No ! they have strengthened it in every possible way. They have piled up the evidence against themselves until they have made it as strong and as solid as a wall of adamant.

In the first place, they show that the drawers were contractors, and they do not couple that fact with any evidence showing or tending to show that the contract was ever violated in any particular. No requi-

sition was ever made upon Russell, Majors, and Waddell which was not fully complied with. The army in Utah did not perish for lack of supplies, and not an ounce of provisions, not a shred of clothing, was ever furnished by anybody but these contractors. There was a running account between them and the United States, of which the War Department had supervision, and there is no scintilla of proof that the account was overdrawn, as it stood when these bills became due. Moreover, they prove that Congress recognized the existence of this very debt by making a specific appropriation for its payment. Of the six hundred and seventy-three thousand dollars placed at the disposal of the War Department for that purpose in July, 1860, it does not appear that one cent was ever applied as it ought to have been. There it was then, and there it is now, unless it has been unlawfully and dishonestly perverted to some other purpose.

If these drawers were in debt to the United States, after being charged with the accepted bills, it was plainly and obviously the duty of the War Department to have an account stated, and take legal measures to collect the balance. But no settlement was ever made, no claim against them was ever asserted, no suit was ever brought. If the successors of Floyd knew Russell, Majors, and Waddell to be not only defaulters, but fraudulent contractors, who had falsely got their overdrafts accepted, then the omission to vindicate the rights of the Government was a gross and shameful crime, compared to which the worst thing charged against Floyd was an act of white-robed innocence. But you are not asked to make that imputation. They did not connive with defaulters to shelter them from justice, and defraud the United States. They understood very well that the United States had no claim against them, and could have none in any event. But they had made up their minds to cheat the holders of this paper out of their just rights, and *therefore* they determined to smother up the truth.

If the refusal to settle an account could be explained in a way which would make it at once consistent with fidelity to the Government and justice to the claimants, there is another thing which admits of no possible excuse. Why did they not produce their books and records, after the court below declared that the case was open to all equities? They surely knew that there could be no equity in their favor as long as they failed to prove the want of funds in their hands. But they obstinately refused to produce the requisitions, the vouchers, the credits, or the charges. They withheld them in wanton disregard of what they owed to the administration of justice. The presumption *in odium spoliatoris* applies to an officer as it does to anybody else; at all events, no party, public or private, can withhold material evidence, which is in his own exclusive possession, and afterward be permitted to say that it would have made in his favor if he *had* produced it.



Do not allow yourselves to be imposed upon by that paragraph in the second finding which says that there was due to the drawers, at each of the several times when the bills of Morgan and the two banks were accepted, \$17,884·84, and the same sum to a fraction on the 18th of May, 1860, nearly a year afterward. If this proves anything, it shows that the contractors always drew for exactly \$17,884·84 less than their earnings. The court did not say how this singular fact occurred, nor why the balance was at all times kept back to that specific point by a party whose credits were accumulating at the rate of hundreds of thousands every month. If it had said that the drafts were not charged against the account, and still the balance in their favor was only \$17,884·84, we would have been bound to take for true what we could not believe, namely, that nothing was earned under the contract during all that time. But the court could not say that, for the judges knew it was not only unsupported by proof, but contrary to all the known facts of the case, and opposed to the direct evidence which came from the mouth of a witness called by the Government itself.

There is our case. Bills of exchange drawn by contractors against an account with the United States, and accepted by the head of the proper department, in pursuance of legal authority, and a practice as old as the Government itself, passed to the claimants, who took them in perfect good faith at the highest rates, and payment refused, not because the drawers had no funds in the hands of the acceptors, but because the War Department took a fancy that it would be pleasant and profitable, and perhaps popular, to withhold from the claimants the money which was due to them by every principle of justice and law. Their defense is that the claimants ought to suffer because the officer was guilty of some pretended irregularity in the exercise of his power to bind the United States. And they think they can cover the shameful nakedness of this fraud with such a paltry fig-leaf as that!

We have no objection that you shall look to the public interest, if you will take a broad view of it. If the nation owed no debt except this, and expected never to contract another, then she would have no practical use for her character, and all that could be filched from these claimants would be so much clear gain. But we are not in that situation. We owe some thousands of millions, and our securities are selling in the markets of the world for about seventy-five cents on the dollar. That they sell for that much is evidence that some persons believe in our honesty; that our six-per-cents do not sell for one hundred and twenty-five or thirty, while English three-per-cents bring ninety-five, proves that in some quarters we are seriously doubted. We have some credit to gain as well as some to lose. If you could do anything which would at once inspire universal faith in the commercial integrity of this nation for the present and the future, you would add a

thousand millions to the available wealth of the country, and give incalculable strength to the Government at home and abroad. If you would at once destroy what confidence does exist, you would bring calamities upon us, to which war, pestilence, and famine would be visitations of mercy.

It is a mistake, which you certainly are in no danger of making, to suppose that this thing, which we call the national honor, is merely set up to glitter in the eyes of the world; to inflame the pride of our own people, and excite the admiration of others. It has a practical value which might be counted in dollars and cents, if the sum were not too large for human arithmetic. The nation that preserves it untarnished can, without money, do all that others can do with it. She need not hoard her treasures. When the emergency requires it, she has but to say the word, and capitalists come from all the ends of the earth to pour out uncounted millions at her feet. Junius said: "Private credit is wealth, public honor is security; like the feather on the wing of your eagle, it not only decorates the royal bird, but it sustains him in his flight; strip him of his plumage, and you fix him to the earth."

The advantage of simple good faith is strikingly shown in the history of British India. A handful of adventurers, organized as a trading company, from a little island in the Northern Ocean, twenty thousand miles away, got a foothold on the shore, and commenced a struggle, at first for existence, and then for supremacy. Their enemies were the native princes, who were rich in everything except a good character. But nobody would lend them a rupee, even on a promise of fifty per cent interest, because the chances were always more than even that some excuse for non-payment, like that which is here set up, would be framed out of the "circumstances of the case." Every man that had money buried it deep in the earth, or walled it up in the solid masonry of his house, to prevent his government from getting it by fraud or force. But it was soon ascertained that the English were in the habit of keeping their contracts. When they made a promise, it was as certain to be performed as the sun was to rise and set at the appointed times. Immediately the coin was brought forth from its hiding-places and offered to the English company at any rate of usance they might be willing to give, three or four per cent being the utmost that was asked. This gave the company the command of all the wealth in the country, and put in its hands an irresistible power which, in the course of a few years, made them masters of all that opulent region, with a hundred and fifty millions of people. Macaulay, who understood the subject thoroughly, declares these vast results to have been produced more by the mere fact that the company never, *under any circumstances*, denied its debts, or tarnished its commercial honor, than by all other causes put together.



Any state, community, or nation may have such a character, if it chooses to deserve it by an honest compliance with all its obligations. But that is the sole condition upon which it can be got or kept. Mr. Webster said of Alexander Hamilton that "he smote the rock of the national resources and an abundant stream of revenue gushed forth; he touched the dead corpse of public credit and it sprang to its feet." How? By what magic was a modern statesman able, even in a figurative sense, to reproduce the miracles of Moses and Elijah? Simply by giving to the world a practical assurance that his Government was utterly incapable of descending to the meanness which would trifle with a legal contract, or deny the payment of an honest debt. Without that the fountain in the rock would have dried up in an hour; without that the reanimated corpse would have sunk back again into the arms of death, as cold and as stiff as ever. Remember, it is not enough that you pay one favored class of your creditors—those who are favored to-day may be the victims of to-morrow. To make any of them sleep the sound sleep of men who feel secure in their rights, you must show that you are animated by that high sense of justice, which consecrates all legal obligations alike.

I do not say that your decision in this case will immediately produce a total collapse in your whole financial system. Its effect will not be appreciated at first. But when it comes to be considered, and understood, and adopted as a precedent in other cases, it can not but have a most pernicious effect on the public credit. It is a stab at the national honor. Like Mercutio's wound, it is not as wide as a church-door nor as deep as a well, but it will do your business for you in the course of time. A little leaven leaveneth the whole lump, and it can not be long before the principle of such a decision will pervade the whole mass of the public indebtedness. *Nemo repente fuit turpissimus*; no man ever became thoroughly wicked all at once, and no nation ever went down to the bottomless pit of repudiation at a single plunge. The "*descensus Averni*" is rather steep to be sure, and it gets steeper and steeper the farther you go; but it is not quite perpendicular. This is a start in that direction, and all the more dangerous because it may excite but little apprehension at first. If the whole people should be shocked by it, the recoil alone might save us from destruction. But those things which are most terrible in maturity are always least alarming in their infancy. A rat-hole in a Dutch dike is not a formidable affair at first; it lets in very little water in comparison to the great ocean continually surging up against it; but it washes wider and wider every hour, and, at last, a mighty tide goes pouring through it—enough to drown whole cities, and cover all the plains about them. Look well to your rat-holes, unless you are willing to be submerged; beware how you suffer repudiation of a small debt if you wish the large ones to be secure.



You can readily imagine the impression such a case as this would make upon you if you would hear of it as occurring in a foreign country. Suppose you would read in some authentic publication that the French Minister of War had made a large contract for supplies to the army in Algiers. The contractor proceeds to perform his full duty, and draws upon the minister from time to time for his earnings. The minister accepts his bills cautiously, and always for less than fifty per cent of the money which will be due to the contractor when he delivers the goods then at Marseilles, and ready to be shipped across the Mediterranean. These accepted bills are offered to a banker, who is willing to take them at their full value as first-class commercial paper; but, in order to make assurance doubly sure, he calls on the minister and asks if they are safe. The minister affirms, and affirms truly, that he gave the acceptances in pursuance of law, and according to a practice which dates as far back as the time of the crusades, and solemnly declares that they will certainly be paid at maturity. The bills are taken, paid for in good faith, and kept until they are due. But, when payment is demanded, the holder finds the portfolio of the War Office in the hands of a new minister, who sullenly and silently refuses to pay. No reason is given. It does not appear that the contractor failed in his contract; no assertion is made that his earnings did not equal the amount of his drafts. The minister refuses to settle his accounts, and thus acknowledges that the balance is in favor of the drawer. Payment seems to be refused for no reason except that the new minister can thereby curry favor with his master by throwing additional odium upon his fallen predecessor. The holder appeals to the other authorities, from whom he receives neither aid nor comfort. At length he invokes the Court of Cassation, the highest tribunal of justice in the Empire, and that court, after hearing the cause debated, holds that this unworthy trick, by which an honest and confiding man has been swindled out of his fortune, is perfectly consistent with French ideas of public morality; and that whosoever shall deal with that government must expect precisely that kind of justice, and no other. After seeing this, would you believe much in the good faith of that nation? If you had any of its securities, would not you feel like rolling them up and getting rid of them as soon as possible?

But I have supposed an impossible case. No such thing could occur with any European government. If it occurs here, we will stand alone, a fixed image for the scorn of the world to point her finger at. In France they have had six revolutions in eighty years—totally changing each time not only the rulers but the whole structure of their political system. No party, even in the white heat of its triumph, ever repudiated the debts of its predecessors. In the wildest frenzy of the first revolution—when the country was governed by the mere passions of the Jacobin Club—they dragged the king to the guil-



lotine and chopped his head off for *making* the debts—that was what Judge Baldwin would call “looking to their officers”—but the contracts which he made in the name of the nation, while his legal authority lasted, were sacredly kept. When the Bourbons were restored, in 1815, they studiously ignored the very existence of Napoleon; they struck his name out of the records wherever they could, and substituted their own in its place; they pulled down the monuments erected to honor him, and gave back the fruits of his victories to the nations from whom he had wrested them; they treated his whole reign as one continued rebellion against their just authority: but they acknowledged the obligation of the debts he contracted, even to maintain his rebellion, because he was at the time *de facto* chief of the state. They knew how unsafe any other action would be, for their creditors would look forward, if they themselves did not, to the time when some new Napoleon would arise, who might treat their contracts as they would treat those of the first emperor. The public debt of France lies imbedded beneath six layers of revolutions, and that portion which lies the lowest is paid as faithfully as the contract that was made but yesterday. Are we to acknowledge that we can not get through the thin crust of prejudice created by one change of administration? If yes, what is to become of our creditors when the great changes take place which probably await us in the future?

But you will wipe away the stain which this act of the War Department has cast upon the nation, and send her forward upon the clear, bright line of justice which stretches out straight before her. So will she have length of days in her right hand, and in her left hand riches and honor.

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PROVIDENCE RUBBER COMPANY *vs.* GOODYEAR'S  
EXECUTOR, *ET AL.*

MR. BLACK said he would confine himself entirely to what has justly been called the *main case*, and be as brief about that as he possibly could.

At this stage of the discussion it is not necessary to make any prefatory statement of the facts, except to remind the court of the order and sequence in which they occurred.

Charles Goodyear got his patent in 1844. In 1849 he surrendered it and took a re-issue. In 1858, when it was about to expire, he made application for an extension, and succeeded, as we allege, by a fraud. In 1859, or in the early part of 1860, he died. In December, 1860, his personal representatives again surrendered the patent, and this time they took out two patents, instead of the one which had covered

the invention before. It is for infringing these two patents that the appellants were sued.

The defense which they set up in the Circuit Court was somewhat multifarious. That part of it which went most directly to the merits of the case may be stated in a breath: The plaintiffs had no valid patent, and we had a license from the patentee for all acts that were charged against us in the bill as unlawful and wrong. The judge of the Circuit Court overruled these defenses, and all the other defenses that we made. He declared that the plaintiffs had a patent which was good enough, and he ignored our license altogether. Thereupon the court made a decree against us, which would have seemed harsh and excessive even if we had been infringers in bad faith upon a legal and honest patent. Its magnitude will be understood when I tell you one fact: In 1858, when Goodyear made application for the extension of his patent, he swore to the sum he had made from it up to that time. For using his invention, with half the force of one factory (not a large one) at Providence, during a period of two years, and then only at intervals few and far between, this decree makes the defendants pay more than twice as much as Goodyear swore he had been able to get for the use of that same invention by all the manufacturers in the United States put together in the whole course of fourteen years.

One of the decrees made by Lord Bacon, when he was Chancellor of England, was pronounced in the House of Lords to be a "killing decree"; and this is one of the same kind. If my learned friend (Mr. Stoughton) comes anywhere near the truth in the statement he has made about the defendants' circumstances, it not only broke up their business for the time, but it must, if executed, drive them out into uttermost ruin and bankruptcy. It is a *killing* decree. No wonder that they are here beseeching you "to deliver them from the body of this death." They have faith enough to believe that you will save them alive, if you can do so consistently with your sense of justice and your love of law.

On some of the points taken in the Circuit Court I will be entirely silent, but I will maintain, if I can, the five propositions which I am now about to enumerate.

*First.*—The extension of 1858 was procured by an actual fraud, and is therefore absolutely null and void. If that be true, the plaintiffs have no patent now, and had none at any time since 1858, when their original patent expired.

*Secondly.*—The two patents re-issued on the surrender of 1860 are not for two different inventions, nor for two separate and distinct parts of one invention, but for two halves of one single invention, which is an indivisible unit, not capable of being separated. The legal consequence is that both patents are void, or else the two are to be



treated as one. In the latter case the admitted defect in one of the patents is fatal to both of them.

*Thirdly.*—Both of those patents are void for another reason. In both of them the claim is broader than the invention, and in that one which was sustained by the court the over-claim is more palpable than in the other, which the court below adjudged, and which the counsel opposed to us now admit, to be without a pretense of validity.

*Fourthly.*—We had a license, plain, unambiguous, and authentic, which gave us for a good consideration, by apt words and in proper form, the authority of the patentee himself to use his invention precisely as we did use it, and to make the very goods which we are sued for making.

*Fifthly and lastly.*—The Master in Chancery, to whom the court sent this case to make up an account against us, based his calculation of our profits on a rule for which we can find no precedent in the books, no analogy in the law, no foundation in any principle of natural justice. This report, I am satisfied, would, upon further discussion and reflection, have been set aside by the court below; but it was not done, and this court is bound now and here to do what ought to have been done by the Circuit Court then and there.

If you agree with us on any one of the four first points, the plaintiffs' case must go entirely by the board, and the bill be dismissed. If you concur with us only on the last one, the decree must be reversed, and another substituted in its place, very much less in amount.

It is unfortunate for us that Mr. Justice Clifford decided this cause against us on the circuit. Of course, if, upon reconsideration, he finds that he fell into error, he will hasten to correct it before it produces irreparable mischief. But it is hard upon us to have the weight of his judgment thrown into the scale against us; for we must admit that, whenever our argument comes in conflict with his opinion, the presumption is that he is right and we are wrong, unless we show the contrary by clear reasoning or by very decisive authority.

I. So far as the law of our first point is concerned, Judge Clifford is with us, as I understand him.

MR. JUSTICE CLIFFORD.—You mean probably about the question on the re-issue.

MR. BLACK.—No. I refer to the effect of the fraud by which the extension of 1860 was procured. The judge conceded as matter of law that we had a right to defend ourselves against an extended patent, void for the kind of corruption imputed to this one, if we could do so by satisfactory proof. It may not be expressed with his usual felicity of diction, or with all the terseness which is common to his opinions, but it admits of no other interpretation.

Our proposition, stated in general terms, is, that any grant, whether of land, money, or privileges, made by the Government through

a judicial or executive agent, is wholly void if procured by trick, imposture, or any species of actual fraud. Where the object is to set aside and cancel the grant, the fraud must be proved in a direct proceeding, instituted for that very purpose, by the Government itself; but when the question of its validity arises in a suit between private parties, it must be determined like any other question so far, and so far only, as they have an interest in it. The party whose rights would otherwise be injuriously affected by it may show the truth in self-defense.

Our learned opponents have surprised me by squarely asserting the doctrine that a private party must submit to be ruined by a void and fraudulent grant, unless the Government chooses to apply for its cancellation. To back this they produce but a single case. Passing over the simple elementary principles found in the text-books, and ignoring the hundreds of cases in which their theory is contradicted, they adroitly call your attention to *Seabury vs. Field* (19 How., 323), which proves nothing on the subject. The head-note of the reporter, read by my brother Evarts, gives no idea of the decision, which was this: A and B both had grants for the same land; A had the elder and was in actual possession; B's, besides being junior, was worthless for want of registry. Nevertheless B brought ejectment, and the court held that he could not be permitted to make out his case by showing the defendant's patent to be fraudulent. Is that a denial of the principle we contend for? Would you infer from this that a *defendant* in possession under a title *prima facie* good might not prove the patent on which the *plaintiff* sued him to be void for corruption?

A patent, or the extension of a patent, is wholly void if obtained by fraud. This is not denied. It is, therefore, a mere nullity; it has no legal existence; it is inoperative for any purpose. Would Mr. Evarts or Mr. Stoughton advise a client to bring suit for the infringement of a void patent? In all the vast variety of their professional achievements have they ever recovered on a void instrument of any kind? Do they suspect that any court within the limit of Christian civilization would permit such a recovery? If the defendant in a case like this shows that the plaintiff's patent is void, because it was not issued by the proper officer, or because the claim is broader than the invention, or because the discovery of the patentee had been anticipated by another, nobody would think of saying that the suit could be sustained. My learned friends, all three of them, would admit *una voce* that the patent, being void for any of these reasons, the cause is a failure. They would admit that any kind of invalidity might be shown, except that which comes from the willful fraud of the party who seeks to gain by it. Does the law maintain this strange anomaly out of pure tenderness for the interests of rascaldom? Does a court of equity punish an honest patentee for a mere blunder, and then



break all the rules of its logic for the sake of giving protection to knavery and corruption? I certainly would have expected my friends on the other side to admit that their claim is defeated by any proof which shows their patent to be void, and, above all, if it be void for the dishonesty by which it was procured.

There is no species of fraud upon which the mind of a judge looks with so much abhorrence as a false and deceptive collusion between parties who profess to be managing a cause on opposite sides. It is a scandalous shame upon the law. It poisons the stream of justice at its very fountain. No judgment, sentence, or decree of any tribunal, judicial or quasi-judicial, can stand if proved to be obtained in that way. Not only will a court of equity give relief to a third person who is injured by it, but the lowest court in the country may disregard it when it comes into question collaterally.

We insist upon it that the judge of the Circuit Court was right in holding that we might make this defense. He went on, however, to say that we could not avail ourselves of it unless we proved it satisfactorily. To this also we assent most cordially. You can not presume fraud in such a case; it must be proved; and proof that is not satisfactory is no proof at all. But if the fraudulent collusion is not irresistibly made out in this case, there is an end of all reliance on human evidence. Let us see.

I take it for granted that nobody on the bench, or at the bar, has meant to cast the slightest imputation on the veracity of the witnesses who testify on this subject. They are among the most eminent counselors in this country—Mr. Jenckes, Mr. Brady, Mr. Blatchford, Mr. Judson, and Mr. Clarence Seward. Two of these gentlemen are dead, one of them has been translated to the bench; the other two still remain at the bar, enjoying now, as they have ever enjoyed, the entire confidence of all the courts in which they practice, including this court. They could not have made any mistake, for their statements relate to a proceeding which they themselves conducted from beginning to end; all which they saw, and a large part of which they were. Some circumstantial variety there may be, but not the least conflict in their testimony upon any material point. Nor are they contradicted by anybody else. On the contrary, all the known facts in the case corroborate them in every word.

Now, what do they say? The unvarnished account which I shall give of their testimony is fully verified by the record. The counsel of the Goodyear patentees was applied to and his advice sought concerning this application. After conferring with others, he and they came to the deliberate conclusion that the application could not go through the Patent-Office upon the facts as they knew them to be. In other words, there was not even a forlorn chance of success, if anybody acquainted with the subject would make opposition to it in good faith.

Opposition was apprehended from Horace Day, who had always been the inveterate enemy of Goodyear, and of all the Goodyear party. It was not to be expected that he would pretermitt such an opportunity as this "to feed fat that ancient grudge he bore them." He was not only hostile to the parties, but he had a deep interest in preventing the extension, and he had already employed a large corps of able counselors to take charge of that interest. He also had within his reach, and within his knowledge, the facts which would make his opposition irresistible and overwhelming. There was nothing for it but to buy Day, and he was bought. They had raised a fund of nearly \$70,000—the licensees being regularly organized for the purpose of prosecuting this application—and had put that fund into the hands of a treasurer, whose business was to pay it out wherever it could be made most effective. I do not say that any portion of the fund was paid into the hands of Day, for the record does not show that it was; but it is perfectly clear that a large portion of it was paid to his counsel, and with his consent.

The consideration which brought Day into the service was an agreement with him that if he would aid them, in the way thought to be most effective at the time (I use the language of Mr. Brady), in getting an extension, which he and they knew they had no right to, they would divide with him the fruits of their joint iniquity. That is, after this nefarious extension should be obtained in this criminal way, they would hunt in couples, and prey on the public in partnership. In pursuance of that corrupt arrangement, Day sent his whole effective force to the side of the applicants. All the powers that he had arrayed in the field against the extension struck their tents and marched over in a body to the other camp. He sent them there, and after they were there they continued to act under his orders. But he himself kept his flag flying. He continued ostensibly in his old position, and loudly vaunted his determination to hold it to the last extremity; while his lieutenants were training their guns upon it and blazing away with all their might.

To speak without metaphor: Day came before the commissioner, denounced the application as most nefarious, and claimed the right, which he had as an American citizen interested in the subject-matter, to appear there as a party. This was conceded, and his name was placed on record as the party opposing the extension, for the protection of his own rights and the rights of all persons who were situated as he was. Occupying that attitude, he treacherously gave away the cause which he pretended to support. He was legally entitled to notice of every step that might be taken in the proceeding. He had a right to cross-examine the witnesses for the extension, and he exercised it only in the interests of the applicants. He took voluminous depositions himself, but he took precious good care to include in them



none of the facts which would injure the chances of the other side. Upon the commissioner they had all the imposing effect that was due to opposition evidence. He had a right to suppose that what was not proved by a vigilant and malicious enemy like Day did not exist; and accordingly that constituted a very large element in the judgment which he finally made up.

Not content with that, Mr. Day filed an affidavit of his own, which he swore to, filled with the most extravagant accusations against Goodyear and his friends, all of which appeared to the commissioner, in the light of the evidence before him, to be merely false. The affidavit may have been true, or he may have thought it was true; but it is certain that he did not intend it to be believed by the commissioner, for at that very time he was engaged in aiding the counsel on the other side to make up an argument, out of materials which he himself furnished, to prove that every line and letter of his own affidavit was false.

The commissioner naturally and necessarily looked upon Day as a base persecutor, and on Goodyear as a much-injured and very ill-used gentleman. They had calculated precisely the effect of this upon Mr. Holt's mind. They knew very well that in proportion as his wrath would be roused against Day, in that proportion his affections would warm to Goodyear. He decided the case in a perfect tumult of feeling, which poured itself forth in a stream of blazing rhetoric, filled with maledictions on Day, but coupled with such a eulogy on Goodyear as scarcely any benefactor of the human race has ever deserved. Mirabeau's funeral oration on Dr. Franklin before the French Academy was tame in comparison. I am not aware that any one has ever pronounced so lofty a panegyric on the genius and virtue of Newton, La Place, or Kepler.

All this was brought about by trick, imposture, deception. Mr. Holt never saw the case in any light approaching the truth. He understood none of the relations which existed between any of the parties. He was compelled to put a false construction upon all their conduct, and all their words, and all their evidence. From beginning to end of the proceeding he was surrounded with all the machinery of false pretenses, and at every step he was misled by some false token.

And now you are told by Mr. Evarts that we have not proved this fraud to be the *cause* of the decision, since Mr. Holt might peradventure have decided the same way anyhow on the true merits of the case. Are we bound to prove not only the fraud and its connection with the grant, but also that one would not have existed without the other? No; the rule undoubtedly is that the slightest contact of fraud with any grant taints it through and through. It is either altogether pure or else it is wholly void. But this is not merely a *touch*—it is all fraudulent; and the covin is mixed with every part of it.

You do not trace the deception here as you generally do in other cases, like a dirty thread running through a clean tissue into which it has been woven, but the whole web, warp and woof, is made of corrupt and rotten material.

But you may, if you choose, imagine what Mr. Holt would have done if he had known what you know. Suppose he had suddenly caught these people with their masks off, and discovered that all this persecution which made him so indignant was paid for by the Good-year party, and furnished on contract, like an article of merchandise; that they were acting in concert, and not in hostility at all; that when they stood before him glaring at one another with simulated ferocity they were only playing the part set down for them; that he was sitting there, like a country boy at a theatre, and made to believe that the sham battle was a real thing; that all the parties were banded and confederated together to play upon him and "fool him up to the top of his bent." What would he have done? Why, the parties themselves (or the counsel rather) have told you on their oaths that Mr. Holt, being an honorable man, would have instantly decided against the extension, if he had discovered Day's collusion with the applicants. You can not doubt—you have no right to doubt—that had the parties thrown aside their disguises for one moment, and allowed themselves to be seen in their true character, he would have done what either of you would have done in the same circumstances; that is, blown the case into atoms. So, therefore, we have shown (what in such a case is generally impossible) not only that a fraud was committed, but that the detection of the fraud would have defeated the purpose for which it was practiced.

We have shown more—much more. It is incontestibly proved that by the collusion with Day the applicants succeeded in covering up the receipt by Goodyear of more than two hundred thousand dollars—a sum greatly larger than the whole amount which they disclosed. It is pretended that they could have proved these receipts, thus falsely kept from the knowledge of the commissioner, to be for the hard-rubber patent. But that can not be true, for the simplest of all reasons: Charles Goodyear was not the owner of the hard-rubber patent, and never in his life had the smallest right to take a cent on that account.

These combined parties were guilty of another concealment, which I will mention to show the enormous magnitude of the outrage which was perpetrated on public justice and private right. You know, and everybody knows, that Charles Goodyear's patent was the richest monopoly this Government ever bestowed upon any private man. From the moment it issued the revenues of those who had it were counted by millions. But only a small part of its proceeds went directly into the pockets of Goodyear himself. These plaintiffs, and others with



whom they confederated to get the extension, had induced him to give them assignments and licenses for nothing, or next to nothing—stripped him of his right to an imperial income, and then sent him, old, sick, and insolvent, across the Atlantic, to starve and die in a foreign country. His genius, his virtue, the value of his invention, and the raggedness of his poverty, were the themes on which they dilated before the commissioner. Mr. Holt decided erroneously that, although the public had already paid for the invention a thousand times over, yet, as it was the assignees who got the money, he would grant the extension for the benevolent purpose of relieving the inventor himself. He did not know (what he would have known but for the fraudulent conspiracy to deceive him) that those same assignees had their grip on the extension as tight as it ever was on the original patent; that they had already secured the fruits of it to themselves; that all the profits of the decision asked for would go, not to relieve Goodyear, but to swell the colossal fortunes of the sharp and heartless men who had already reduced him to the last extremes of want and necessity. These same assignees are now here declaring, in their arguments and on the record, that Goodyear's executors shall not have a cent out of this decree. Their attitude is as hostile to him as to us. With an ambidextrous rapacity which is fairly appalling they reach out one hand to grab the property of the defendants, and with the other they fight off the family and creditors of the man whose virtuous poverty they pleaded as the only foundation of their right to take it at all. If Mr. Holt had known these things, would he, could he, have granted the extension?

I submit that it is perfectly impossible. His written opinion, taken in connection with all the facts as they are now known, shows beyond doubt that his decision was obtained solely by, and in consequence of, the imposture practiced upon him.

But we are told that the defendants are bound to be dumb on the subject of this fraud, atrocious as it is, because they consented to it. It is urged that we can not open our mouths to complain of it without admitting our own guilt, and *nemo audiendum est suam turpitudinem allegans*. Our learned friends are wrong in their law, and totally mistaken about the matter of fact.

A plaintiff who seeks equity must come into court at least with clean hands, if not with a pure heart. If it be shown that his claim rests upon his own corruption, it is no answer to say that his opponent is as bad as himself. He can not make out a title for relief by accusations against the other party, which do not clear his own skirts. A court of law *generally*, and a chancellor *always*, refuses to interfere between two parties who are equally culpable. In such a case the maxim is *melior est conditio defendentis*.

But I answer this whole argument by denying the fact. I wish to

make the denial as emphatic as possible. If I had the voice of forty thousand trumpets I could not speak my contradiction more loudly than the truth would warrant. The defendants never said, or did, or suffered anything which directly or indirectly, expressly or by any kind of implication, involves them in, or connects them with, the dishonest tricks by which the extension was procured. They knew nothing whatever of that most filthy bargain with Day; did not suspect it; had no reason to suspect it until long afterward, when the plaintiffs and Day quarreled about the division of the spoils, and *peached* upon one another.

Nor did they ever give any sort of assent to the extension itself, except what consisted in mere forbearance to oppose it. They had a license for making japanned or varnished goods, which, by its terms, was to last as long as any patent which Goodyear then had or might afterward be able to obtain. They had another license for shoes and boots, which was to expire with the then existing patent. Their last license, it was agreed, should be renewed in case the extension was obtained. The defendants did not intend to be engaged, and never were engaged, in any business except what these two licenses would fairly cover. They could pay the tariffs reserved and still have a reasonable profit. They had no interest which would justify them in coming here to spend money, time, and labor in opposing the application. Nor had they any hostile feelings to Goodyear; they were his friends—one of them the most intimate friend he ever had; they had sustained him in all his troubles; they had given him their factory and materials to make goods for himself at a time when he was not able to pay them a cent, and he never did pay; they were his creditors then, and are now: this record shows that they have an unsatisfied judgment against him for eighty thousand dollars, and that he died hopelessly insolvent. If he had lived, and could have prevented it, this iniquitous suit would never have been brought. Does the forbearance of the defendants under these circumstances disarm them of the right of self-defense against the void extension? Must they submit in silence to be ruined by a fraud of which they knew nothing until its perpetrators gave them notice that they were to be its victims? The plaintiffs' counsel have not pretended that there is any *legal* estoppel upon us—if there were, equity would relieve from it; and I ask each member of the court to tax his memory and see whether he can recollect a single case, at all analogous to this one, in which the doctrine of *equitable* estoppel was, or ought to have been, applied.

II. My second point does not lie so entirely on the surface of the case; indeed, my ingenious friends have succeeded in burying it rather deep out of sight. I mean the separation of the two inventions into two patents, which makes this a somewhat curious case.



Your honors know that India rubber, in its native condition, is inapplicable to many purposes for which some of its qualities seem to fit it. A great number of persons were, consequently, engaged in trying to improve its usefulness. The first one who made any considerable progress in that direction was Nathaniel Hayward, who discovered that a compound of rubber and sulphur was very superior to native rubber, and he got a patent. The drawback upon the value of his invention was, that the cost of making the mixture was so great that it would not pay expenses. To remedy this, Chaffee (one of these defendants) invented a very complicated piece of machinery for grinding the rubber up and mixing it with the sulphur in proper proportions. His machine did this easily, cheaply, and rapidly, and it also was patented. After this, Hayward's compound of rubber and sulphur, mixed together by means of Chaffee's machine, went into universal use. The demand for it was extensive enough to keep several large factories in operation. But Hayward's compound, superior as it was to simple rubber, was very far from being a perfect thing. It was so sensitive to heat and cold that in the winter it stiffened and became as hard as a bone, while in the summer it was so sticky that it could scarcely be handled. Then came Goodyear's invention, which consisted, simply, in the discovery that Hayward's compound of rubber and sulphur was a better article when cooked, baked, or roasted, than it was in its raw state. Subsequently to that he found that the addition of another ingredient to the compound, namely, a carbonate or other salt, or oxide of lead, increased the value of the compound. But the improvement, by cooking Hayward's compound, was the great secret which he disclosed.

He said that he had found this out by accident. He had a piece of Hayward's compound in his hand and let it drop thoughtlessly upon the cylinder of a stove, moderately heated, where it lay for some time. When he took it up he found it materially changed in some of its qualities. The alteration was like that which a piece of dough suffers when the action of heat converts it into bread.

Unfortunately for himself and others, his description obscured it very much. He went round and round the point with a wide circumlocution. He was not an impostor—I don't say he was a humbug—but he was a quack, an empyric, a sciolist, without any of that grand simplicity which belongs to true genius. After exhausting his vocabulary of scientific words in showing how a thing might be baked in an oven without once using the Saxon word that would have made it perfectly plain, he bespoke for the cooked article the name of *vulcanized rubber*—a term far-fetched from the Greek mythology—but it looked classical to some, and mysterious to others. He was like that ambitious and learned showman who said to his customers: "This here animal the common folks calls a *billy-goat*, but we gentlemen of science calls him the *Gulielmus Capricornus*."

His discovery was precisely analogous to one that was made in Ireland soon after Sir Walter Raleigh introduced potatoes into that country. For a while the natives ate them raw, and did not find them very good; but one of the tubers happened to fall into the hot ashes of a turf fire, and was found to be much improved. Since that time the Irish people have *vulcanized* all their *potatoes*.

I have not made these remarks to depreciate the value of Goodyear's invention. It was a great benefaction to the world. I only wish he had not tried to mystify the public by marring its simplicity. If it was true that he was the original discoverer, and the first to apply it to practical purposes, he was entitled to a patent. It was believed to be true, and he got a patent, which patent, re-issued and extended, was held by him and his assignees during his whole life-time, much to their profit. But after his death it was again surrendered and two patents were taken out, one as they say for the process and one for the product—one for the cause and one for the effect—one for the result and one for the only means by which the result can be brought about. I dare not call this absurd when I recollect who it is that thinks it very sensible and proper; but to me it seems as inconsistent with reason as it would be for the inventor of a new horse-power to get one patent for putting the horse to the machine, another for putting the machine to the horse, and a third for putting the two together. The Circuit Court held that the original patent for Goodyear's single and simple invention was separable into two. Upon looking at one of them the judge ascertained that it was wholly void, but he held the other to be good, and good not only for that part of the invention which it was intended to cover, but good for all the purposes that both patents would have served, if both had been free from objection. One of the grave questions you have now to decide is whether this ruling can be sustained.

I do not deny that on the surrender of one patent the re-issue may consist of two others. The act of Congress authorizes this, but expressly confines it to cases where the re-issued patents are for *distinct and separate* parts of the invention covered by the original. What are "*distinct and separate parts*"? Judge Grier says *different inventions*. Certainly the statute does not permit several patents, except for parts of an invention which are so far unconnected that they may be separately used for practical purposes.

For instance, suppose a man to have a patent for a locomotive, which he describes as being fitted up with a steam whistle. He may surrender it and take two patents—one for the locomotive and one for the whistle—because a locomotive may be a useful machine without a whistle, and a whistle may be used, not only on a locomotive, but on the engine of a ship, or on a stationary engine at a mill or a furnace. But could he divide his whistle into two parts, and take one patent for



the process and one for the product of that? The process there would be a certain mode of letting the steam escape through an aperture in the boiler, and the product is that shrill and startling noise which rushes along the track, darts across the plains, and echoes among the hills. If these could be separated into different patents, then they might be sold to different persons. One would have the exclusive right to let his steam escape, provided he made no noise, and the other might whistle as much as he pleased, if he did not use the only possible means of doing so. This is the *reductio ad absurdum* of the opposing doctrine, and it shows fairly the legal impossibility of separating process and product where one is useless without the other.

I am not flying in the face of any decision that has ever been made by this court or by any judge on the circuit. I do not deny that a patent may issue for a product alone, or for a process alone. But this is consistent with reason and law only where the process is a new means of bringing about some result previously known but produced in other ways, or else where the product is a new result of means previously used and still applicable to other purposes. But, where the two stand together in the invariable relation of cause and effect—where the process always produces one result and the product comes only from the one process—then God and Nature have put them together, and no man can put them asunder.

Emerson got a patent for making brass. Brass had been known and used from the time of Tubal Cain, but previous to 1780 it had been made by mixing copper clippings with calamine, a native carbonate of zinc, and heating them until the carbon was driven off and the zinc became incorporated with the copper. Emerson adopted the simple plan of making the amalgam by taking its two constituent metals in their pure state and melting them together. His patent was for nothing but a process.

The man who invented German silver had or might have had a patent for the product only. That was a new amalgam composed mainly of copper and tin. The modes of uniting metals were numerous, and almost as old as the hills. But this man could say to the world, "No matter how you mingle these metallic elements; you may hammer them together in a forge; you may heat them together in a crucible until one is absorbed by the other; you may melt them together; you may melt them separately and run them together while they are in a state of fusion; or you may melt the one which fuses at the highest temperature and throw cold lumps of the other into the molten mass; but howsoever you do it you shall not by any process make the product of which I first discovered the value, and which I was the first to make known."

What Goodyear discovered was simply a law of nature, that a certain cause would produce a certain effect upon rubber and sulphur.

You can not put this into any intelligible form of words without expressing the whole of it; no effort of the mind will enable you to conceive it in separate parts; the effect can not exist without the cause, and the cause is not cause at all unless it produces the effect.

Judge Clifford demonstrated the impossibility of dividing this invention. He found that the patent for the process was void, and of course we were not infringers of that. But he said that we had infringed the patent for the product, which was good. Upon these facts he did his very best—I take it upon me to say that he exerted all his ingenuity to the utmost—to divide the damages and apportion them to the different patents; for as an honest man and an upright judge it must have been the desire of his whole heart to relieve us from any damages on account of a charge which he found us not to be guilty of. But he could not make the separation even theoretically. Sharp as his metaphysical scissors were, and skillful as you know him to be in the use of them, he could find no place where he could insert them between process and product in this case. He saw plainly enough that separation was destruction.

But in truth there is no product here. Changing the rubber and sulphur by baking it is not making a new thing. The temporary application of an external agent changes one quality of the compound, namely, its sensitiveness to the variations of weather, and leaves its other characteristics—flexibility, elasticity, imperviousness—unaltered. There is no change in the substance of the compound itself.

Judge Grier once made a remark which these patentees seem to have caught at with great avidity. It was not a *decision* of either fact or law, but merely *obiter dictum*, and I think he himself must now believe it to be wrong. He said that, as we could know nothing of matter except by its qualities, the matter was new if its quality was changed. This is specious enough to have received the assent of some great thinkers long before Judge Grier uttered it. The metaphysical philosophy of the last century was full of it. Locke began by asserting that the secondary qualities of bodies had no inherent connection with the substances to which they seemed to belong, but only with the organs which perceived them: color existed in the eye, the odor of a violet in the nose, and the temperature of a hot iron in the nerves that shrunk from its contact; or, as Butler put it,

“There’s no more heat in fire that heats you,  
Than there is pain in stick that beats you.”

Berkeley, by the same reasoning, showed the unreality of the primary qualities, and removed the seat of their ideal existence to the mind, where the ultimate impression of them was made. Starting with the assumption that matter was nothing but an assemblage of qualities, and, like Judge Grier, denying all other knowledge of sub-



stance, the reasoning seemed to be faultless. Dugald Stewart said that Bishop Berkeley had proved by unanswerable arguments what no man in his senses could possibly believe. It was a dismal theory. It abolished the created universe without restoring the reign of Chaos and old Night. It dissolved all human relations, for the bodies of men were merely "such stuff as dreams are made of." It did not "strike flat the thick rotundity of the globe," but it did worse, for it made it a nonentity. "This brave o'erhanging firmament, this gorgeous canopy, fretted with golden stars," was not even what Hamlet called it, "a pestilent congregation of vapors"; it was a huge phantasm, hung on high to cheat and delude us. The fundamental error on which all this "nonsense was piled on nonsense to the skies" consisted in the assumption that we could know nothing of matter except by its qualities. If you adopt it, you will craze the law, and make it as mad as the metaphysics of Berkeley and Hume.

You can not ignore substance, and you can never satisfy the common sense of the world by holding that a new product, separately patentable as such, is made by a person who merely changes a single quality of one substance by the temporary operation of another one upon it. When you send a stream of electricity over a wire wrapped round a piece of soft iron, you change the quality of the iron, by making it capable of attracting other iron, and you restore its original condition when you withdraw the electric current. Does a telegraph-operator create and uncreate a new product every time he closes and opens the galvanic circle? If you take a piece of smooth steel and drive it repeatedly through plates of iron, it will become permanently magnetized; but the steel remains steel, the same substance with one of its qualities altered; and no one can say that a new product has therefore been made.

This preposterous idea of dividing Goodyear's invention into two parts was started and acted upon for the purpose of defrauding the public, and preventing other inventors from getting the just reward of their science and skill. But the legal effect of it has really been to make both the patents utterly void. If you regard them as independent patents, they are void, because each of them is perfectly useless, and the part covered by it incapable of being applied to any practical purpose. Both are in palpable violation of the act of Congress, because they are not for distinct and separate parts of an invention. The best you can possibly do for the plaintiffs is to treat the two patents as one instrument, and that will not help them, for the whole claim, taken and considered together, is admitted by themselves to be false. They are in such connection that, supposing one to be sound, the acknowledged overclaim of the other infects it, "like a mildewed ear blasting its wholesome brother."

III. But we insist that both patents are unsound and void, because the claim is overstated in each of them.

What was the invention? The improvement of Hayward's compound by cooking it. Afterward he claimed that he could make the compound still better by putting in an additional ingredient, to wit, carbonate or oxide of lead. This was the whole length and breadth of his discovery. If he ever knew anything beyond this, he did not disclose it, but "died and made no sign."

His experiments were all made with Para rubber. There were many other elastic gums, including gutta-percha, but they would not cook to advantage without being compounded with other ingredients besides sulphur and lead. Some improvement, therefore, must be made on Goodyear's invention, or else the business would come to a dead stand whenever the supply of Para rubber would give out, as it soon did. These other gums began to be used, but it was impossible to make a merchantable article without additional ingredients, and the skill of many manufacturers was employed in finding out how to vulcanize them. The owners of the Goodyear patent saw that other gums, unknown to him, were about to be vulcanized by means which he had never thought of. In order to anticipate all improvements, and keep the undivided monopoly of the business in their own hands, they surrendered their patent and took a re-issue of two. In one they claimed "all vulcanizable gums," and in the other they asserted their exclusive right to vulcanize them, not only by using the ingredients which Goodyear had discovered, but all others. They claim that all vulcanizing of all gums is within Goodyear's invention, and they claim it equally whether it be effected "with or without other ingredients." By these two patents they say to all who engage in the business, "You may go to the farthest part of the world for new gums to vulcanize, and, after you find them, you may search the earth, the ocean, and the air for new ingredients to make them useful, but all your skill, and science, and labor in making these indispensable improvements must inure to our benefit. *Sic vos non vobis.*"

I beg your honors to consider the authorities on this point which we have cited in our brief. We are within the principle of all the cases, and the opinion of the court in *Morse vs. O'Reilly* is literally applicable to the patent which our opponents try to sustain.

IV. A word now about our license. The plaintiffs at one time contended that it was in conflict with the license previously granted to the Naugatuck Company; but that question has not been raised here. Judge Clifford settled it completely, and put it to sleep.

MR. JUSTICE CLIFFORD.—Several judges have decided it differently, but I still think I was right.

MR. BLACK.—I was not aware that any *judge* had ever doubted



upon the point, and I do not see how he *could* dissent from your conclusion if he saw your reasons. It is apparent that you have convinced the opposing counsel, much against their will—certainly against their interests—and a judgment which silences *them* ought to be very satisfactory to others.

The *argumentum ad hominem* has been tried upon us. It is said that the defendants were sued, or threatened with a suit, in 1856, for making shoes and boots, and they compromised without pleading or producing this license. The fact is true, and I hope I can give a satisfactory reason for the refusal of my clients to defend against that suit under this license. They were too honest to make a defense which they believed to be false. They knew that a license to manufacture japanned cloths was not a license to make shoes. Our distinguished opponents must have felt a sore need of arguments before they could have thought of resorting to this one.

The truth is that only one rational ground can be taken against our license. There is but one fair way to get clear of it, and that is to sustain Judge Clifford's construction of it, and show that it means something wholly different from what we understand it to mean. If the "japanned cloths" of the license are the kind of goods we made, that puts an end to all controversy.

Mr. JUSTICE CLIFFORD expressed his assent to this.

Mr. BLACK.—I am glad to find that, in your honor's mind, as well as in my own, the dimensions of the question are narrow and simple. When you come to review yourself, I know with what alacrity you will embrace what you see to be the truth.

Let me ask you, then, to look carefully at this license. It is a most important paper to the parties, and it deserves your close and serious attention. It is dated in 1846; it is in proper form; it is undeniably authentic; it is a license from Goodyear, the patentee, to Chaffee, one of the defendants, and his assigns, authorizing him and them, for a consideration therein expressed, to use the invention of Goodyear in the manufacture of certain goods. What goods?

We do not assert—we have never asserted—that the license is universal. It is limited. But within the limits it is clear and unambiguous. It does certainly give to the licensee and his assigns a full and complete right to use the invention of the patentee to cover *cloths* with vulcanized rubber. We can cover nothing but woven fabrics called cloths; not shoes or wooden-ware or metallic substances. And it does *not* include *all* cloths, but only such as shall be so covered for the purpose of being *japanned*. But *if they are japanned*, they may be of any color—plain, marbled, or variegated—and there is no restriction upon the size or shape of them. They may have any form to suit the market, and the purchasers may use them for anything they like—to cover tables, pianos, or carriages; for firemen's capes,

soldiers' blankets, ponchos, or shelter-tents. I have stated the true legal effect of the license; you can not give it any other effect without interpolating into the contract what the parties did not put and never meant to put there. It is perfectly certain that Goodyear desired his invention to be used as extensively as possible for making japanned cloths, and of course he wanted the cloths, when made, to be used for all the purposes to which they could be made applicable. This was equally the interest of both parties. If it had been expressed in ambiguous terms, the licensees would be entitled to the benefit of the doubt, upon the familiar rule of interpretation, which requires that all private deeds shall be construed most strongly in favor of the grantee. It remains, therefore, only to consider, *whether* the goods we are sued for making are *japanned cloths or not*.

It is not denied that our use of the invention consists in covering cloths with vulcanized rubber. It is equally undeniable that these cloths thus covered are varnished, so as to give them a smooth, glossy, lustrous surface; about this there is no dispute. They prove it, and we prove it, and nobody denies it. We say that cloths thus made, covered, and finished are *japanned*, and here we are met by a flat contradiction; *our opponents assert that this is not japanning*. The question ought to be a simple one and easily decided.

In the first place, we think we can safely rely on your knowledge of the English language, as spoken in this country, for a just interpretation of the word in question. You know that in common parlance a thing japanned is one which has a very smooth, bright surface, and is so called because it resembles the wares imported into this country and Europe from Japan. You are also well enough acquainted with the mechanic arts to know that the kind of surface called "*japanned*" can be produced only by putting a varnish on it. If you know this I need not tell you that our cloths are *japanned*, for they have the lustrous surface produced by skillful varnishing.

But if you are not willing to rely on your own unassisted knowledge of words and things, look at the dictionaries. Webster defines japanning just as we do—producing a highly polished surface, *by means of varnish*, after the manner of the Japanese. Worcester makes it the mere synonym of varnishing.

If this be not satisfactory, take the highest kind of scientific authority. The "*National Cyclopædia*" (London, 1849) describes the art, gives its history, shows forth the modes of its practice, and accounts for the word which designates it: A japanned article *always* has a lustrous surface, which is *always* produced by applying *varnish*; there is no other means of producing it either in Europe, Japan, China, Siam, Burmah, or elsewhere, so far as known. The "*Encyclopædia Americana*" gives a similar but not so detailed an account. All authorities concur in saying that *varnishing* is *japanning*.



But perhaps this is not sufficient. Then look at the evidence of the experts. Seven witnesses, of unimpeachable character and well versed in the business, come forward and swear that *our cloths are japanned*, because they are varnished; that japanning means varnishing and nothing else; that in fact the word *japanning* has been displaced to a great extent by the terms *varnishing* and *lustering*, which signify the same thing. One solitary man is produced on the other side who says that our cloths are *not japanned*. He does not deny that they have the glossy surface of japanned ware, and he admits they are varnished; but he says they are not japanned because, forsooth, we do not put the varnish on the rubber cloth as he puts it on calf-skin when he makes patent leather! The idiot who could make such a statement, and give such a reason for it, is the only authority our opponents have for asserting that our manufacture is not inside of the license.

Besides all this, we have proved the contemporaneous construction which the license received from the parties themselves. Immediately after its date Chaffee began the manufacture of japanned cloths at Naugatuck. He japanned them—he gave them a varnished surface. Goodyear was there and saw it done, and recognized that as the art which he had described in the license as japanning. He not only made no objection to such a manufacture under the license, but he besought the licensee to continue it when his losses admonished him to quit. Not only did Goodyear acknowledge this to be the true meaning of the license, but the Naugatuck Company, under whom the plaintiffs claim, made the same admission. That corporation aided and assisted Chaffee in making varnished cloths—varnished blankets—under this license; and now the plaintiffs assert that the license does not protect him or his assignees, when they are doing the same thing. I insist on it that they are estopped to deny now what the party they claim under admitted then. But I do not care about using the argument in that way; the point I take is too strong on other grounds to need it.

This evidence that all parties regarded varnished cloths as japanned, within the meaning of the license, immediately after its date, has made a powerful impression on our adversaries. They have done their utmost to resist it. But their utmost amounts to very little. They contend that, inasmuch as the varnish was put on the cloth at Naugatuck after the rubber was on and vulcanized, and at Providence the rubber and the varnish were put on together, before either was heated, *therefore*, the cloth was *not japanned*, that is to say, *not varnished at all*, at the latter place. This mode of reasoning they must have learned from that curious, and somewhat hardy, witness who swore that varnishing was not varnishing unless the varnish was put on leather and cloth in exactly the same way.

You can not make even a superficial investigation of this art of japanning without learning that the word applies to all kinds of varnishing, where the object is to produce a highly polished and lustrous surface, whether upon metal, wood, paper, rubber, or leather; and no matter what previous preparation may have been made for the reception of the varnish. The modes of doing it are infinitely various, but it is all japanning.

This license is not open to any question of construction; it requires no interpretation. It means what it says. It does not speak in an unknown tongue; it is not ambiguous in its terms. It does not "palter with us in a double sense." It has no hidden signification which needs to be spelled out or conjectured. The plain, obvious, and undoubted import of its words is to give us the privilege of making any amount of varnished rubber cloths, paying to Goodyear three cents per yard as royalty or tariff. We have shown this by an appeal to your own knowledge of the language; by the dictionaries and the encyclopædias; by the testimony of every sensible and intelligent witness, and by the acts of all the parties. In the face of all this our adversaries have the boldness to say that we manufacture these varnished or japanned cloths *without* a license.

But there is one consideration which seems perfectly conclusive: this license to make japanned cloths *means something*. If we are mistaken about it, give us the true intent. If the words are not to be understood in their popular sense, or according to their definition in the dictionaries and books of science, or agreeably to the acceptance of them by men engaged in the trade, I demand to know how they are to be taken. If the license does not authorize the use of Goodyear's invention to make cloths with a highly varnished surface, such as the defendants are sued for making, tell us what it does authorize. It will not do to say it has no meaning at all, for that would be a gross violation of the rule quoted with so much approbation by Judge Clifford, that every instrument must be so construed, *ut res magis valeat quam pereat*. There never lived two men less likely than Goodyear and Chaffee to make an insensible and absurd paper on any subject connected with the rubber business; for they had devoted their lives to it; they had studied it as men seldom study anything; both had made it the subject of their contemplation by day and night for many years. But our opponents leave you no alternative except to understand the license as we understand it, or else treat it as wholly unintelligible and meaningless. You are compelled to say either that we had a good license, which justified every act we did, or else that Goodyear and Chaffee did not know what they were about when they made it.

No party, counselor or witness, on the side of the plaintiffs, has dared to bring forward a definition or description of *japanning* which



differs from ours. They can say, easily enough, that ours is wrong ; but what is right ? A specific truth, established by authority, and resting upon common sense, is not to be overthrown by an empty negative ; the light can not be extinguished by pouring darkness upon it. In a question of art or physical science the ignorance which confesses its inability to define one of its commonest terms is not entitled to the weight of a feather in the judicial scale. The solitary witness who did *not know* what the license meant is but a sorry match for the half-dozen of intelligent gentlemen who *did* know.

V. I might say much, but I will say only a little on the question of damages. I have three reasons for this : (1) I must hasten to a close ; (2) This matter has been fully argued already ; and (3) I can not believe that you will ever reach this part of the case. It can not be that you will give *any* damages in a suit founded upon a patent which was extended by fraud and corruption, cut into halves by the owners for the purpose of overstating the claim, and with each of the halves claiming more than the whole of the invention. If you could allow such a party on such evidence to recover at all, you surely could not permit him to get damages from a defendant who holds a clear, plain license like ours. But still I wish to justify myself for the strong statement I have made against the magnitude of this decree.

There were *three different* inventions used in the manufacture of these cloths : Hayward's, for the compound of rubber and sulphur ; Chaffee's, for the machine which made the mixture ; and Goodyear's, for cooking it. Each was equally indispensable. All of them had been patented and all the patents had expired. But the patent for Goodyear's had been extended. Is he entitled to recover all the profits made by the use of all these inventions ? Certainly he could recover only his own if the others had also been extended. Congress and the Patent-Office refused to extend them, for the expressed reason that the public had already paid for them, and manufacturers were fairly entitled to use them without paying again. But this decree bases itself on a principle which totally defeats the known intentions of Congress. The public is not relieved, but the refusal of an extension to Hayward inures to the benefit of Goodyear ; and Chaffee can not use his own invention without Goodyear's permission. The decree, in effect, says that the expiration of the other two did not extinguish the exclusive rights of the patentees, and make their inventions common property, but merely operated as a transfer of those rights to Goodyear's assignees. I beg your honors to consider if this be right ; and if it be, tell us how it may be vindicated so as to make it acceptable to the minds of fair men, who are not sufficiently skilled in dialectics to comprehend the justice of it without your help. I am particularly anxious

that my client, Colonel Brown, who is a patriot soldier and a good Christian gentleman, should understand this point. If he is compelled to pay hundreds of thousands of dollars for the use of expired patents because these greedy cormorants got another one extended by fraud, he ought to know why, and it is somebody's duty to tell him.

Another thing : one of the patents sued on is admitted to be void. Why should we be compelled to pay for that ? You may answer : because the inventions covered by these two patents are so connected that the infringement of one is necessarily an infringement of the other ; one can not be used without using both. Be it so. I admit that to be true. But it proves that there can be no recovery on either, for it shows that they are not for *separate* and *distinct* inventions, and therefore both are void. Here we have our learned opponents on the horns of a dilemma. If they have two patents for two *distinct* and *separate* parts of an invention, and they recover on one but not on the other, their legal and equitable right to at least one half of the damages is gone hopelessly ; for, if the inventions are distinct, so are the infringements and the damages. If, on the other hand, they say the two patents are for one invention, and the damages can not be separated, then both are void, and their whole claim is overboard.

The rule of damages seems to be plain enough. The principle is well settled that the patentee is entitled only to compensation. He can not recover vindictive or exemplary damages. Where the patentee is not himself engaged in using the invention, he is injured by an infringer only to the extent of what he has lost by missing the sale of a license. In a case like this, a patentee should have what a fair man would have been willing to take for the use of his invention, so far as it is covered by a sound patent. Assuming the one patent in this case to be properly sustained by the Circuit Court, the decree, instead of giving damages for *all three* of the inventions, should have ascertained what was lost by the infringement of *half a one*. The damages are at least six times as large as they ought to be if the court was right in everything else.

But the court not only made us pay for three inventions, but the damages were greatly increased by counting against us, and awarding to the plaintiffs, all that we made as merchants by the purchase of goods which afterward rose in the market. What this had to do with the patent right, or why we should account for profits so made, it is impossible to see.

I will say nothing on the other exceptions, for I do not wish to repeat what was so impressively said by Mr. Payne and Mr. Cushing. I will make no reply to the merry remarks of Mr. Evarts and Mr. Stoughton on the compensation claimed by the defendants for their labor. That part of the argument of my learned friends, considered



merely as wit and eloquence, was a splendid success ; but it lacked logic and law most sadly.

I repeat my conviction (which is also that of my colleagues) that the master's report was confirmed by a kind of default, for want of convenient time to consider it or to hear it discussed. The judge knew it would come here, at all events, and he preferred to examine it along with his brethren.

But the plaintiffs had full swing before the master. They got whatever they chose to demand. They swelled the report in every possible way, and in some ways that might have been thought impossible. It sprung out of nothing, but it grew into proportions of prodigious magnitude. Nothing like it has ever been seen in this class of cases. Mammoth decrees have been made before, but this one "upheaves its vastness" like the huge "behemoth, biggest born of earth."

I am conscious that all this discussion about damages is a waste of time. There will be *no* damages. The fraud in the extension is fatal ; the separation of the invention destroyed it ; the overclaim made both patents void, and our license is as complete and perfect a defense as any court ever saw.

And now, if you are as tired of listening as I am of speaking, you will be glad to hear me say that I am done.

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## IN DEFENSE OF THE RIGHT TO TRIAL BY JURY.—EX-PARTE MILLIGAN.

SUPREME COURT OF THE UNITED STATES.

"THIS defense of the right of trial by jury is a marvelous display of Judge Black's extraordinary power and abilities as a lawyer, and the enduring importance of the subject will render it interesting as long as the individual liberty of the citizen shall be preserved as part of the framework of human government. It was delivered during a period of great political excitement, before the passions and prejudices stirred up by the greatest civil war in history had been allayed. It affected the destiny of one whose crimes were aimed at the destruction of the Government itself, and the public desire to see the sentence of the commission executed was very general. Since the anger and excitement of the times have passed away, and the great questions involved in this case present themselves in their true aspect and importance, the argument of Judge Black becomes conspicuous as a defense of the dearest rights of the citizen, and stands like a monument to which the eyes of mankind will turn in the hour when their rights are assailed. It will be admired by the student as a comprehensive exposition of the fundamental principles upon which the law of civil liberty depends, and the causes which led to their perfection and adoption

under our system. The subject loses the dry, tedious detail of a legal argument, and becomes animated with the spirit and genius of the speaker, while presenting a review of the struggle between freedom and arbitrary power which the world has witnessed for centuries. It will be considered precious by persons in every walk of life, for it defines in a masterly manner the natural rights guaranteed to each individual by the organic law, and its importance in this respect clothes it with the heritage of immortality."—"*Great Speeches by Great Lawyers*," Baker, Voorhis & Co.

*May it please your Honors:*

I am not afraid that you will underrate the importance of this case. It concerns the rights of the whole people. Such questions have generally been settled by arms. But since the beginning of the world no battle has ever been lost or won upon which the liberties of a nation were so distinctly staked as they are on the result of this argument. The pen that writes the judgment of the court will be mightier for good or for evil than any sword that ever was wielded by mortal arm.

As might be expected from the nature of the subject, it has been a good deal discussed elsewhere, in legislative bodies, in public assemblies, and in the newspaper press of the country. But there it has been mingled with interests and feelings not very friendly to a correct conclusion. Here we are in a higher atmosphere, where no passion can disturb the judgment or shake the even balance in which the scales of reason are held. Here it is purely a judicial question; and I can speak for my colleagues as well as myself when I say that we have no thought to suggest which we do not suppose to be a fair element in the strictly legal judgment which you are required to make up.

In performing the duty assigned to me in the case, I shall necessarily refer to the mere rudiments of constitutional law; to the most commonplace topics of history, and to those plain rules of justice and right which pervade all our institutions. I beg your honors to believe that this is not done because I think that the court, or any member of it, is less familiar with these things than I am, or less sensible of their value; but simply and only because, according to my view of the subject, there is absolutely no other way of dealing with it. If the fundamental principles of American liberty are attacked, and we are driven behind the inner walls of the Constitution to defend them, we can repel the assault only with those same old weapons which our ancestors used a hundred years ago. You must not think the worse of our armor because it happens to be old-fashioned and looks a little rusty from long disuse.

The case before you presents but a single point, and that an exceedingly plain one. It is not encumbered with any of those vexed questions that might be expected to arise out of a great war. You are not



called upon to decide what kind of rule a military commander may impose upon the inhabitants of a hostile country which he occupies as a conqueror, or what punishment he may inflict upon the soldiers of his own army or the followers of his camp; or yet how he may deal with civilians in a beleaguered city or other place in a state of actual siege, which he is required to defend against a public enemy. This contest covers no such ground as that. The men whose acts we complain of erected themselves into a tribunal for the trial and punishment of citizens who were connected in no way whatever with the army or navy. And this they did in the midst of a community whose social and legal organization had never been disturbed by any war or insurrection, where the courts were wide open, where judicial process was executed every day without interruption, and where all the civil authorities, both State and national, were in full exercise of their functions.

My clients were dragged before this strange tribunal, and after a proceeding, which it would be mere mockery to call a trial, they were ordered to be hung. The charge against them was put into writing and is found on this record, but you will not be able to decipher its meaning. The relators were not accused of treason; for no act is imputed to them which, if true, would come within the definition of that crime. It was not conspiracy under the act of 1861; for all concerned in this business must have known that conspiracy was not a capital offense. If the commissioners were able to read English, they could not help but see that it was made punishable, even by fine and imprisonment, only upon condition that the parties should first be convicted before a Circuit or District Court of the United States. The Judge-Advocate must have meant to charge them with some offense unknown to the laws, which he chose to make capital by legislation of his own, and the commissioners were so profoundly ignorant as to think that the legal innocence of the parties made no difference in the case. I do not say, what Sir James Mackintosh said of a similar proceeding, that the trial was a mere conspiracy to commit willful murder upon three innocent men. The commissioners are not on trial; they are absent and undefended; and they are entitled to the benefit of that charity which presumes them to be wholly unacquainted with the first principles of natural justice, and quite unable to comprehend either the law or the facts of a criminal cause.

Keeping the character of the charges in mind, let us come at once to the simple question upon which the court below divided in opinion: Had the commissioners jurisdiction—were they invested with legal authority to try the relators and put them to death for the offense of which they were accused? We answer, No; and therefore the whole proceeding, from beginning to end, was utterly null and void. On the other hand, it is absolutely necessary for those who oppose us to assert,

and they do assert, that the commissioners had complete legal jurisdiction, both of the subject-matter and of the parties, so that their judgment upon the law and the facts is absolutely conclusive and binding, not subject to correction, nor open to inquiry in any court whatever. Of these two opposite views, you must adopt one or the other; for there is no middle ground on which you can possibly stand.

I need not say (for it is the law of the horn-books) that where a court (whatever may be its power in other respects) presumes to try a man for an offense of which it has no right to take judicial cognizance, all its proceedings in that case are null and void. If the party is acquitted, he can not plead the acquittal afterward in bar of another prosecution; if he is found guilty and sentenced, he is entitled to be relieved from the punishment. If a Circuit Court of the United States should undertake to try a party for an offense clearly within the exclusive jurisdiction of the State courts, the judgment could have no effect. If a county court in the interior of a State should arrest an officer of the Federal navy, try him, and order him to be hung for some offense against the law of nations, committed upon the high seas or in a foreign port, nobody would treat such a judgment otherwise than with mere derision. The Federal courts have jurisdiction to try offenses against the laws of the United States, and the authority of the State courts is confined to the punishment of acts which are made penal by State laws. It follows that where the accusation does not amount to an offense against the law of either the State or Federal Government, no court can have jurisdiction to try it. Suppose, for example, that the judges of this court should organize themselves into a tribunal to try a man for witchcraft, or heresy, or treason against the Confederate States of America, would anybody say that your judgment had the least validity?

I care not, therefore, whether the relators were intended to be charged with treason or conspiracy or with some offense of which the law takes no notice. Either or any way, the men who undertook to try them had no jurisdiction of the *subject-matter*.

Nor had they jurisdiction of the *parties*. It is not pretended that this was a case of impeachment, or a case arising in the land or naval forces. It is either nothing at all, or else it is a simple crime against the United States, committed by private individuals not in the public service, civil or military. Persons standing in that relation to the Government are answerable for the offenses which they may commit only to the civil courts of the country. So says the Constitution, as we read it; and the act of Congress of March 3, 1863, which was passed with express reference to persons precisely in the situation of these men, declares that they shall be delivered up for trial to the proper civil authorities.



There being no jurisdiction of the subject-matter or of the parties, you are bound to relieve the petitioners. It is as much the duty of a judge to protect the innocent as it is to punish the guilty. Suppose that the secretary of some department should take it into his head to establish an ecclesiastical tribunal here in the city of Washington, composed of clergymen "organized to convict" everybody who prays after a fashion inconsistent with the supposed safety of the State. If he would select the members with a proper regard to the *odium theologicum*, I think I could insure him a commission that would hang every man and woman who might be brought before it. But would you, the judges of the land, stand by and see their sentences executed? No; you would interpose your *writ of prohibition*, your *habeas corpus*, or any other process that might be at your command, between them and their victims. And you would do that for precisely the reason which requires your intervention here: because religious errors, like political errors, are not crimes which anybody in this country has jurisdiction to punish, and because ecclesiastical commissions, like military commissions, are not among the judicial institutions of this people. Our fathers long ago cast them both aside among the rubbish of the Dark Ages; and they intended that we, their children, should know them only that we might blush and shudder at the shameless injustice and the brutal cruelties which they were allowed to perpetrate in other times and other countries.

But our friends on the other side are not at all impressed with these views. Their brief corresponds exactly with the doctrines propounded by the Attorney-General, in a very elaborate official paper which he published last July, upon this same subject. He then avowed it to be his settled and deliberate opinion that the military might "*take and kill, try and execute*" (I use his own words) persons who had no sort of connection with the army or navy. And, though this be done in the face of the open courts, the judicial authority, according to him, are utterly powerless to prevent the slaughter which may thus be carried on. That is the thesis which the Attorney-General and his assistant counselors are to maintain this day, if they can maintain it, with all the power of their artful eloquence.

We, on the other hand, submit that a person not in the military or naval service can not be punished at all until he has had a fair, open, public trial before an impartial jury, in an ordained and established court, to which the jurisdiction has been given by law to try him for that specific offense. There is our proposition. Between the ground we take and the ground they occupy there is and there can be no compromise. It is one way or the other.

Our proposition ought to be received as true without any argument to support it; because if that, or something precisely equivalent to it, be not a part of our law, this is not, what we have always supposed it

to be, a free country. Nevertheless, I take upon myself the burden of showing affirmatively not only that it is true, but that it is immovably fixed in the very framework of the Government, so that it is utterly impossible to detach it without destroying the whole political structure under which we live. By removing it you destroy the life of this nation as completely as you would destroy the life of an individual by cutting the heart out of his body. I proceed to the proof.

In the first place, the self-evident truth will not be denied that the trial and punishment of an offender against the Government is the exercise of judicial authority. That is a kind of authority which would be lost by being diffused among the masses of the people. A judge would be no judge if everybody else were a judge as well as he. Therefore in every society, however rude or however perfect its organization, the judicial authority is always committed to the hands of particular persons, who are trusted to use it wisely and well; and their authority is exclusive; they can not share it with others to whom it has not been committed. Where, then, is the judicial power in this country? Who are the depositaries of it here? The Federal Constitution answers that question in very plain words, by declaring that "*the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish.*" Congress has, from time to time, ordained and established certain inferior courts; and in them, together with the one Supreme Court to which they are subordinate, is vested all the judicial power, properly so called, which the United States can lawfully exercise. That was the compact made with the General Government at the time it was created. The States and the people agreed to bestow upon that Government a certain portion of the judicial power, which otherwise would have remained in their own hands, but gave it on a solemn trust, and coupled the grant of it with this express condition that it should never be used in any way but one; that is, by means of ordained and established courts. Any person, therefore, who undertakes to exercise judicial power in any other way not only violates the law of the land, but he treacherously tramples upon the most important part of that sacred covenant which holds these States together.

May it please your honors, you know, and I know, and everybody else knows, that it was the intention of the men who founded this Republic to put the life, liberty, and property of every person in it under the protection of a regular and permanent judiciary, separate, apart, distinct, from all other branches of the Government, whose sole and exclusive business it should be to distribute justice among the people according to the wants of each individual. It was to consist of courts, always open to the complaint of the injured, and always ready to hear criminal accusations when founded upon probable cause; sur-



rounded with all the machinery necessary for the investigation of truth, and clothed with sufficient power to carry their decrees into execution. In these courts it was expected that judges would sit who would be upright, honest, and sober men, learned in the laws of their country, and lovers of justice from the habitual practice of that virtue; independent, because their salaries could not be reduced; and free from party passion, because their tenure of office was for life. Although this would place them above the clamors of the mere mob and beyond the reach of Executive influence, it was not intended that they should be wholly irresponsible. For any willful or corrupt violation of their duty, they are liable to be impeached; and they can not escape the control of an enlightened public opinion, for they must sit with open doors, listen to full discussion, and give satisfactory reasons for the judgments they pronounce. In ordinary tranquil times the citizen might feel himself safe under a judicial system so organized.

But our wise forefathers knew that tranquillity was not to be always anticipated in a republic; the spirit of a free people is often turbulent. They expected that strife would rise between classes and sections, and even civil war might come, and they supposed that in such times judges themselves might not be safely trusted in criminal cases—especially in prosecutions for political offenses, where the whole power of the Executive is arrayed against the accused party. All history proves that public officers of any Government, when they are engaged in a severe struggle to retain their places, become bitter and ferocious, and hate those who oppose them, even in the most legitimate way, with a rancor which they never exhibit toward actual crime. This kind of malignity vents itself in prosecutions for political offenses, sedition, conspiracy, libel, and treason, and the charges are generally founded upon the information of hireling spies and common delators, who make merchandise of their oaths, and trade in the blood of their fellow-men. During the civil commotions in England, which lasted from the beginning of the reign of Charles I to the revolution of 1688, the best men and the purest patriots that ever lived fell by the hand of the public executioner. Judges were made the instruments for inflicting the most merciless sentences on men the latchet of whose shoes the ministers that prosecuted them were not worthy to stoop down and unloose. Let me say here, that nothing has occurred in the history of this country to justify the doubt of judicial integrity which our forefathers seem to have felt. On the contrary, the highest compliment that has ever been paid to the American bench is embodied in this simple fact: that if the Executive officers of this Government have ever desired to take away the life or the liberty of a citizen contrary to law, they have not come into the courts to get it done; they have gone outside of the courts, and stepped over the



Constitution, and created their own tribunals, composed of men whose gross ignorance and supple subservience could always be relied on for those base uses to which no judge would ever lend himself. But the framers of the Constitution could act only upon the experience of that country whose history they knew most about, and there they saw the brutal ferocity of Jeffreys and Scroggs, the timidity of Guilford, and the base venality of such men as Saunders and Wright. It seemed necessary, therefore, not only to make the judiciary as perfect as possible, but to give the citizen yet another shield against the wrath and malice of his Government. To that end they could think of no better provision than a public trial before an impartial jury.

I do not assert that the jury trial is an infallible mode of ascertaining truth. Like everything human, it has its imperfections. I only say that it is the best protection for innocence, and the surest mode of punishing guilt, that has yet been discovered. It has borne the test of a longer experience, and borne it better than any other legal institution that ever existed among men. England owes more of her freedom, her grandeur, and her prosperity to that, than to all other causes put together. It has had the approbation not only of those who lived under it, but of great thinkers who looked at it calmly from a distance, and judged it impartially: Montesquieu and De Tocqueville speak of it with an admiration as rapturous as Coke and Blackstone. Within the present century, the most enlightened states of Continental Europe have transplanted it into their countries; and no people ever adopted it once and were afterward willing to part with it. It was only in 1830 that an interference with it in Belgium provoked a successful insurrection which permanently divided one kingdom into two. In the same year, the revolution of the Barricades gave the right of trial by jury to every Frenchman.

Those colonists of this country who came from the British Islands brought this institution with them, and they regarded it as the most precious part of their inheritance. The immigrants from other places, where trial by jury did not exist, became equally attached to it as soon as they understood what it was. There was no subject upon which all the inhabitants of the country were more perfectly unanimous than they were in their determination to maintain this great right unimpaired. An attempt was made to set it aside, and substitute military trials in its place, by Lord Dunmore in Virginia, and General Gage in Massachusetts, accompanied with the excuse, which has been repeated so often in late days, namely, that rebellion had made it necessary; but it excited intense popular anger, and every colony, from New Hampshire to Georgia, made common cause with the two whose rights had been especially invaded. Subsequently the Continental Congress thundered it into the ear of the world, as an unen-



durable outrage, sufficient to justify universal insurrection against the authority of the Government which had allowed it to be done.

If the men who fought out our revolutionary contest, when they came to frame a government for themselves and their posterity, had failed to insert a provision making the trial by jury perpetual and universal, they would have covered themselves all over with infamy as with a garment; for they would have proved themselves basely recreant to the principles of that very liberty of which they professed to be the special champions. But they were guilty of no such treachery. They not only took care of the trial by jury, but they regulated every step to be taken in a criminal trial. They knew very well that no people could be free under a government which had the power to punish without restraint. Hamilton expressed in the "Federalist" the universal sentiment of his time when he said that the arbitrary power of conviction and punishment for pretended offenses had been the great engine of despotism in all ages and all countries. The existence of such a power is utterly incompatible with freedom. The difference between a master and his slave consists only in this: that the master holds the lash in his hands, and he may use it without legal restraint, while the naked back of the slave is bound to take whatever is laid on it.

But our fathers were not absurd enough to put unlimited power in the hands of the ruler, and take away the protection of law from the rights of individuals. It was not thus that they meant "to secure the blessings of liberty to themselves and their posterity." They determined that not one drop of the blood which had been shed on the other side of the Atlantic, during seven centuries of contest with arbitrary power, should sink into the ground; but the fruits of every popular victory should be garnered up in this new Government. Of all the great rights already won they threw not an atom away. They went over *Magna Charta*, the *Petition of Rights*, the *Bill of Rights*, and the rules of the *common law*, and whatever was found there to favor individual liberty they carefully inserted in their own system, improved by clearer expression, strengthened by heavier sanctions, and extended by a more universal application. They put all those provisions into the organic law, so that neither tyranny in the Executive nor party rage in the Legislature could change them without destroying the Government itself.

Look for a moment at the particulars, and see how carefully everything connected with the administration of punitive justice is guarded.

1. No *ex post facto* law shall be passed. No man shall be answerable criminally for any act which was not defined and made punishable as a crime by some law in force at the time when the act was done.

2. For an act which is criminal he can not be arrested without a judicial warrant founded on proof of probable cause. He shall not be

kidnapped and shut up on the mere report of some base spy, who gathers the materials of a false accusation by crawling into his house and listening at the key-hole of his chamber-door.

3. He shall not be compelled to testify against himself. He may be examined before he is committed, and tell his own story if he pleases; but the rack shall be put out of sight, and even his conscience shall not be tortured; nor shall his unpublished papers be used against him, as was done most wrongfully in the case of Algernon Sidney.

4. He shall be entitled to a speedy trial; not kept in prison for an indefinite time without the opportunity of vindicating his innocence.

5. He shall be informed of the accusation, its nature, and grounds. The public accuser must put the charge into the form of a legal indictment, so that the party can meet it full in the face.

6. Even to the indictment he need not answer unless a grand jury, after hearing the evidence, shall say upon their oaths that they believe it to be true.

7. Then comes the trial, and it must be before a regular court, of competent jurisdiction, ordained and established for the State and district in which the crime was committed; and this shall not be evaded by a legislative change in the district after the crime is alleged to be done.

8. His guilt or innocence shall be determined by an impartial jury. These English words are to be understood in their English sense, and they mean that the jurors shall be fairly selected by a sworn officer from among the peers of the party, residing within the local jurisdiction of the court. When they are called into the box he can purge the panel of all dishonesty, prejudice, personal enmity, and ignorance, by a certain number of peremptory challenges, and as many more challenges as he can sustain by showing reasonable cause.

9. The trial shall be public and open, that no underhand advantage may be taken. The party shall be confronted with the witnesses against him, have compulsory process for his own witnesses, and be entitled to the assistance of counsel in his defense.

10. After the evidence is heard and discussed, unless the jury shall, upon their oaths, *unanimously* agree to surrender him up into the hands of the court as a guilty man, not a hair of his head can be touched by way of punishment.

11. After a verdict of guilty he is still protected. No cruel or unusual punishment shall be inflicted, nor any punishment at all, except what is annexed by the law to his offense. It can not be doubted for a moment that, if a person convicted of an offense not capital were to be hung on the order of a judge, such judge would be guilty of murder, as plainly as if he should come down from the bench,



tuck up the sleeves of his gown, and let out the prisoner's blood with his own hand.

12. After all is over, the law continues to spread its guardianship around him. Whether he is acquitted or condemned, he shall never again be molested for that offense. No man shall be twice put in jeopardy of life or limb for the same cause.

These rules apply to all criminal prosecutions. But, in addition to these, certain special regulations were required for *treason*—the one great political charge under which more innocent men have fallen than any other. A tyrannical government calls everybody a traitor who shows the least unwillingness to be a slave. The party in power never fails, when it can, to stretch the law on that subject by construction, so as to cover its honest and conscientious opponents. In the absence of a constitutional provision, it was justly feared that statutes might be passed which would put the lives of the most patriotic citizens at the mercy of the basest minions that skulk about under the pay of the Executive. Therefore a definition of treason was given in the fundamental law, and the legislative authority could not enlarge it to serve the purpose of partisan malice. The nature and amount of evidence required to prove the crime was also prescribed, so that prejudice and enmity might have no share in the conviction. And, lastly, the punishment was so limited that the property of the party could not be confiscated, and used to reward the agents of his persecutors, or strip his family of their subsistence.

If these provisions exist in full force, unchangeable and irrevocable, then we are not hereditary bondsmen. Every citizen may safely pursue his lawful calling in the open day ; and at night, if he is conscious of innocence, he may lie down in security and sleep the sound sleep of a freeman.

I say they are in force, and they will remain in force. We have not surrendered them, and we never will. If the worst comes to the worst we will look to the living God for his help, and defend our rights and the rights of our children to the last extremity. Those men who think we can be subjected and abjected to the condition of mere slaves are wholly mistaken. The great race to which we belong has not degenerated so fatally.

But how am I to prove the existence of these rights ? I do not propose to do it by a long chain of legal argumentation, nor by the production of numerous books with the leaves dog-eared and the pages marked. If it depended upon judicial precedents, I think I could produce as many as might be necessary. If I claimed this freedom, under any kind of prescription, I could prove a good long possession in ourselves and those under whom we claim it. I might begin with Tacitus and show how the contest arose in the forests of Germany more than two thousand years ago ; how the rough virtues and sound

common sense of that people established the right of trial by jury, and thus started on a career which has made their posterity the foremost race that ever lived in all the tide of time. The Saxons carried it to England, and were ever ready to defend it with their blood. It was crushed out by the Danish invasion; and all that they suffered of tyranny and oppression during the period of their subjugation resulted from the want of trial by jury. If that had been conceded to them, the reaction would not have taken place which drove back the Danes to their frozen homes in the north. But those ruffian sea-kings could not understand that, and the reaction came. Alfred, the greatest of revolutionary heroes, and the wisest monarch that ever sat on a throne, made the first use of his power, after the Saxons restored it, to re-establish their ancient laws. He had promised them that he would, and he was true to them, because they had been true to him. But it was not easily done; the courts were opposed to it, for it limited their power—a kind of power that everybody covets—the power to punish without regard to law. He was obliged to hang forty-four judges in one year for refusing to give his subjects a trial by jury. When the historian says that he hung them, it is not meant that he put them to death without a trial. He had them impeached before the grand council of the nation, the Wittenagemote, the parliament of that time. During the subsequent period of Saxon domination no man on English soil was powerful enough to refuse a legal trial to the meanest peasant. If any minister, or any king, in war or in peace, had dared to punish a freeman by a tribunal of his own appointment, he would have roused the wrath of the whole population; all orders of society would have resisted it; lord and vassal, knight and squire, priest and penitent, bocman and socman, master and thrall, copy-holder and villein, would have risen in one mass and burned the offender to death in his castle, or followed him in his flight and torn him to atoms. It was again trampled down by the Norman conquerors; but the evils resulting from the want of it united all classes in the effort which compelled King John to restore it by the Great Charter. Everybody is familiar with the struggles which the English people, during many generations, made for their rights with the Plantagenets, the Tudors, and the Stuarts, and which ended finally in the revolution of 1688, when the liberties of England were placed upon an impregnable basis by the Bill of Rights.

Many times the attempt was made to stretch the royal authority far enough to justify military trials; but it never had more than temporary success. Five hundred years ago Edward II closed up a great rebellion by taking the life of its leader, the Earl of Lancaster, after trying him before a military court. Eight years later that same king, together with his lords and commons in Parliament assembled, acknowledged with shame and sorrow that the execution of



Lancaster was a mere murder, because the courts were open and he might have had a legal trial. Queen Elizabeth, for sundry reasons affecting the safety of the State, ordered that certain offenders not of her army should be tried according to the law martial. But she heard the storm of popular vengeance rising, and, haughty, imperious, self-willed as she was, she yielded the point; for she knew that upon that subject the English people would never consent to be trifled with. Strafford, as Lord-Lieutenant of Ireland, tried the Viscount Stormont before a military commission. When impeached for it, he pleaded in vain that Ireland was in a state of insurrection, that Stormont was a traitor, and the army would be undone if it could not defend itself without appealing to the civil courts. The Parliament was deaf; the king himself could not save him; he was condemned to suffer death as a traitor and a murderer. Charles I issued commissions to divers officers for the trial of his enemies according to the course of military law. If rebellion ever was an excuse for such an act, he could surely have pleaded it; for there was scarcely a spot in his kingdom, from sea to sea, where the royal authority was not disputed by somebody. Yet the Parliament demanded in their petition of right, and the king was obliged to concede, that all his commissions were illegal. James II claimed the right to suspend the operation of the penal laws—a power which the courts denied; but the experience of his predecessors taught him that he could not suspend any man's right to a trial. He could easily have convicted the seven bishops of any offense he saw fit to charge them with, if he could have selected their judges from among the mercenary creatures to whom he had given commands in his army. But this he dared not do. He was obliged to send the bishops to a jury and endure the mortification of seeing them acquitted. He, too, might have had rebellion for an excuse, if rebellion be an excuse. The conspiracy was already ripe, which a few months afterward made him an exile and an outcast; he had reason to believe that the Prince of Orange was making his preparations on the other side of the channel to invade the kingdom, where thousands burned to join him; nay, he pronounced the bishops guilty of rebellion by the very act for which he arrested them. He had raised an army to meet the rebellion, and he was on Hounslow Heath, reviewing the troops organized for that purpose, when he heard the great shout of joy that went up from Westminster Hall, was echoed back from Templar Bar, spread down the city and over the Thames, and rose from every vessel on the river—the simultaneous shout of two hundred thousand men for the triumph of justice and law.

If it were worth the time, I might detain you by showing how this subject was treated by the French Court of Cassation, in Geoffroy's case, under the Constitution of 1830, when a military judgment was unhesitatingly pronounced to be void, though ordered by the king,

after a proclamation declaring Paris in a state of siege. *Fas est ab hoste doceri* : we may lawfully learn something from our enemies—at all events, we should blush at the thought of not being equal on such a subject to the courts of Virginia, Georgia, Mississippi, and Texas, whose decisions, my colleague, General Garfield, has read and commented on.

The truth is, that no authority exists anywhere in the world for the doctrine of the Attorney-General. No judge or jurist, no statesman or parliamentary orator, on this or the other side of the water, sustains him. Every elementary writer from Coke to Wharton is against him. All military authors, who profess to know the duties of their profession, admit themselves to be under, not above, the laws. No book can be found in any library to justify the assertion that military tribunals may try a citizen at a place where the courts are open. When I say no book, I mean, of course, no book of acknowledged authority. I do not deny that hireling clergymen have often been found to disgrace the pulpit by trying to prove the divine right of kings and other rulers to govern as they please. It is true, also, that court sycophants and party hacks have many times written pamphlets, and perhaps large volumes, to show that those whom they serve should be allowed to work out their bloody will upon the people. No abuse of power is too flagrant to find its defenders among such servile creatures. Those butchers' dogs, that feed upon garbage and fatten upon the offal of the shambles, are always ready to bark at whatever interferes with the trade of their master.

But this case does not depend on authority. It is rather a question of fact than of law.

I prove my right to a trial by jury, just as I would prove my title to an estate if I held in my hand a solemn deed conveying it to me, coupled with undeniable evidence of long and undisturbed possession under and according to the deed. There is the charter by which we claim to hold it. It is called the Constitution of the United States. It is signed by the sacred name of George Washington, and by thirty-nine other names, only less illustrious than his. They represented every independent State then upon this continent, and each State afterward ratified their work by a separate convention of its own people. Every State that subsequently came in acknowledged that this was the great standard by which their rights were to be measured. Every man that has ever held office in this country, from that time to this, has taken an oath that he would support and sustain it through good report and through evil. The Attorney-General himself became a party to the instrument when he laid his hand upon the Gospel of God and solemnly swore that he would give to me and every other citizen the full benefit of all it contains.

What does it contain ? This among other things :



"The trial of all crimes except in cases of impeachment shall be by jury."

Again : "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land and naval forces, or in the militia when in actual service in time of war or public danger ; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law ; nor shall private property be taken for public use without just compensation."

This is not all ; another article declares that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law ; and to be informed of the nature and cause of the accusation ; to be confronted with the witnesses against him ; to have compulsory process for the witnesses in his favor, and to have the assistance of counsel for his defense."

Is there any ambiguity there ? If that does not signify that a jury trial shall be the exclusive and only means of ascertaining guilt in criminal cases, then I demand to know what words or what collocation of words in the English language would have that effect ? Does this mean that a fair, open, speedy, public trial by an impartial jury shall be given only to those persons against whom no special grudge is felt by the Attorney-General, or the Judge-Advocate, or the head of a department ? Shall this inestimable privilege be extended only to men whom the administration does not care to convict ? Is it confined to vulgar criminals, who commit ordinary crimes against society, and shall it be denied to men who are accused of such offenses as those for which Sidney and Russell were beheaded, and Alice Lisle was hung, and Elizabeth Gaunt was burned alive, and John Bunyan was imprisoned fourteen years, and Baxter was whipped at the cart's-tail, and Prynne had his ears cut off ? No ; the words of the Constitution are all-embracing—

"As broad and general as the casing air."

The trial of ALL crimes shall be by jury. ALL persons accused shall enjoy that privilege—and NO person shall be held to answer in any other way.

That would be sufficient without more. But there is another consideration which gives it tenfold power. It is a universal rule of construction, that general words in any instrument, though they may be weakened by enumeration, are always strengthened by exceptions. Here is no attempt to enumerate the particular cases in which men

charged with criminal offenses shall be entitled to a jury trial. It is simply declared that *all* shall have it. But that is coupled with a statement of two specific exceptions: cases of impeachment, and cases arising in the land or naval forces. These exceptions strengthen the application of the general rule to all other cases. Where the law-giver himself has declared when and in what circumstances you may depart from the general rule, you shall not presume to leave that onward path for other reasons, and make different exceptions. To exceptions, the maxim is always applicable, that *expressio unius exclusio est alterius*.

But we are answered that the judgment under consideration was pronounced in time of war, and it is therefore, at least morally, excusable. There may, or there may not be something in that. I admit that the merits or demerits of any particular act, whether it involve a violation of the Constitution or not, depend upon the motives that prompted it, the time, the occasion, and all the attending circumstances. When the people of this country come to decide upon the acts of their rulers, they will take all these things into consideration. But that presents the political aspect of the case, with which, I trust, we have nothing to do here. I decline to discuss it. I would only say, in order to prevent misapprehension, that I think it is precisely in a time of war and civil commotion that we should double the guards upon the Constitution. If the sanitary regulations which defend the health of a city are ever to be relaxed, it ought certainly not to be done when pestilence is abroad. When the Mississippi shrinks within its natural channel, and creeps lazily along the bottom, the inhabitants of the adjoining shore have no need of a dike to save them from inundation. But when the booming flood comes down from above, and swells into a volume which rises high above the plain on either side, then a crevasse in the levee becomes a most serious thing. So in peaceable and quiet times our legal rights are in little danger of being overborne; but when the wave of arbitrary power lashes itself into violence and rage, and goes surging up against the barriers which were made to confine it, then we need the whole strength of an unbroken Constitution to save us from destruction. But this is a question which properly belongs to the jurisdiction of the stump and the newspaper.

There is another *quasi*-political argument—necessity. If the law was violated because it could not be obeyed, that might be an excuse. But no absolute compulsion is pretended here. These commissioners acted, at most, under what they regarded as a moral necessity. The choice was left them to obey the law or disobey it. The disobedience was only necessary as means to an end which they thought desirable; and now they assert that though these means are unlawful and wrong, they are made right, because without them the object could not be



accomplished ; in other words, the end justifies the means. There you have a rule of conduct denounced by all law, human and divine, as being pernicious in policy and false in morals. See how it applies to this case. Here were three men whom it was desirable to remove out of this world, but there was no proof on which any court would take their lives ; therefore it was necessary, and being necessary it was right and proper, to create an illegal tribunal which would put them to death without proof. By the same mode of reasoning you can prove it equally right to poison them in their food, or stab them in their sleep.

Nothing that the worst men ever propounded has produced so much oppression, misgovernment, and suffering as this pretense of State necessity. A great authority calls it "the tyrant's devilish plea"; and the common honesty of all mankind has branded it with everlasting infamy.

Of course, it is mere absurdity to say that these relators were *necessarily* deprived of their right to a fair and legal trial, for the record shows that a court of competent jurisdiction was sitting at the very time and in the same town, where justice would have been done without sale, denial, or delay. But concede, for the argument's sake, that a trial by jury was wholly impossible ; admit that there was an absolute, overwhelming, imperious necessity operating so as literally to compel every act which the commissioners did : would that give their sentence of death the validity and force of a legal judgment pronounced by an ordained and established court ? The question answers itself. This trial was a violation of law, and no necessity could be more than a mere *excuse* for those who committed it. If the commissioners were on trial for murder or conspiracy to murder, they might plead necessity if the fact were true, just as they would plead insanity or anything else to show that their guilt was not willful. But we are now considering the legal effect of their decision, and that depends on their legal authority to make it. They had no such authority ; they usurped a jurisdiction which the law not only did not give them, but expressly forbade them to exercise, and it follows that their act is void, whatever may have been the real or supposed excuse for it.

If these commissioners, instead of aiming at the life and liberty of the relators, had attempted to deprive them of their property by a sentence of confiscation, would any court in Christendom declare that such a sentence divested the title ? Or would a person claiming under the sentence make his right any better by showing that the illegal assumption of jurisdiction was accompanied by some excuse which might save the commissioners from a criminal prosecution ?

Let me illustrate still further. Suppose you, the judges of this court, to be surrounded in the hall where you are sitting by a body of armed insurgents, and compelled by main force to pronounce sentence

of death upon the President of the United States for some act of his upon which you have no legal authority to adjudicate. There would be a valid sentence if necessity alone could create jurisdiction. But could the President be legally executed under it? No; the compulsion under which you acted would be a good defense for you against an impeachment or an indictment for murder, but it would add nothing to the validity of a judgment which the law forbade you to give.

That a necessity for violating the law is nothing more than a mere excuse to the perpetrator, and does not in any legal sense change the quality of the act itself in its operation upon other parties, is a proposition too plain on original principles to need the aid of authority. I do not see how any man of common sense is to stand up and dispute it. But there is decisive authority upon the point. In 1815, at New Orleans, General Jackson took upon himself the command of every person in the city, suspended the functions of all the civil authorities, and made his own will for a time the only rule of conduct. It was believed to be absolutely necessary. Judges, officers of the city corporation, and members of the State Legislature insisted on it as the only way to save the "booty and beauty" of the place from the unspeakable outrages committed at Badajos and St. Sebastian by the very same troops then marching to the attack. Jackson used the power thus taken by him moderately, sparingly, benignly, and only for the purpose of preventing mutiny in his camp. A single mutineer was restrained by a short confinement, and another was sent four miles up the river. But, after he had saved the city, and the danger was all over, he stood before the court to be tried by the law; his conduct was decided to be illegal by the same judge who had declared it to be necessary, and he paid the penalty without a murmur. The Supreme Court of Louisiana, in *Johnson vs. Duncan*, decided that everything done during the siege in pursuance of martial rule, but in conflict with the law of the land, was void and of none effect, without reference to the circumstances which made it necessary. Long afterward the fine imposed upon Jackson was refunded, because his friends, while they admitted him to have violated the law, insisted that the necessity which drove him to it ought to have saved him from the punishment due only to a willful offender.

The learned counsel on the other side will not assert that there was war at Indianapolis in 1864, for they have read "Coke's Institute," and Judge Grier's opinion in the *prize cases*, and of course they know it to be a settled rule that war can not be said to exist where the civil courts are open. They will not set up the absurd plea of necessity, for they are well aware that it would not be true in point of fact. They will hardly take the ground that any kind of necessity could give legal validity to that which the law forbids.

This, therefore, must be their position: That although there was



no war at the place where this commission sat, and no actual necessity for it, yet if there was a war anywhere else, to which the United States were a party, the technical effect of such war was to take the jurisdiction away from the civil courts and transfer it to army officers.

GENERAL BUTLER.—We do not take that position.

Mr. BLACK.—Then they can take no ground at all, for nothing else is left. I do not wonder to see them recoil from their own doctrine when its nakedness is held up to their eyes. But they *must* stand upon that or give up their cause. They may not state their proposition precisely as I state it; that is too plain a way of putting it. But, in substance, it is their doctrine—has been the doctrine of the Attorney-General's office ever since the advent of the present incumbent—and is the doctrine of their brief, printed and filed in this case. What else can they say? They will admit that the Constitution is not altogether without a meaning; that at a time of universal peace it imposes some kind of obligation upon those who swear to support it. If no war existed they would not deny the exclusive jurisdiction of the civil courts in criminal cases. How, then, did the military get jurisdiction in Indiana?

All men who hold the Attorney-General's opinion to be true, answer the question I have put by saying that military jurisdiction comes from the mere existence of war; and it comes in Indiana only as the legal result of a war which is going on in Mississippi, Tennessee, or South Carolina. The Constitution is repealed, or its operation suspended, in one State because there is war in another. The courts are open, the organization of society is intact, the judges are on the bench, and their process is not impeded; but their jurisdiction is gone. Why? Because, say our opponents, war exists, and the silent, legal, technical operation of that fact is to deprive all American citizens of their right to a fair trial.

That class of jurists and statesmen, who hold that the trial by jury is lost to the citizen during the existence of war, carry out their doctrine theoretically and practically to its ultimate consequences. The right of trial by jury being gone, all other rights are gone with it; therefore a man may be arrested without an accusation, and kept in prison during the pleasure of his captors; his papers may be searched without a warrant; his property may be confiscated behind his back, and he has no earthly means of redress. Nay, an attempt to get a just remedy is construed as a new crime. He dare not even complain, for the right of free speech is gone with the rest of his rights. If you sanction that doctrine, what is to be the consequence? I do not speak of what is past and gone; but in case of a future war, what results will follow from your decision indorsing the Attorney-General's views? They are very obvious. At the instant when the war begins, our whole system of legal government will tumble into ruin, and if we are not

all robbed, and kidnapped, and hanged, and drawn, and quartered, we will owe our immunity, not to the Constitution and laws, but to the mere mercy or policy of those persons who may then happen to control the organized physical force of the country.

This certainly puts us in a most precarious condition ; we must have war about half the time, do what we may to avoid it. The President or Congress can wantonly provoke a war whenever it suits the purpose of either to do so ; and they can keep it going as long as they please, even after the actual conflict of arms is over. When Peace woos them they can ignore her existence ; and thus they can make war a chronic condition of the country, and the slavery of the people perpetual. Nay, we are at the mercy of any foreign potentate who may envy us the possession of those liberties which we boast of so much ; he can shatter our Constitution without striking a single blow or bringing a gun to bear upon us. A simple declaration of hostilities is more terrible to us than an army with banners.

To me this seems the wildest delusion that ever took possession of a human brain. If there be one principle of political ethics more universally acknowledged than another, it is that war, and especially civil war, can be justified only when it is undertaken to vindicate and uphold the legal and constitutional rights of the people ; not to trample them down. He who carries on a system of wholesale slaughter for any other purpose, must stand without excuse before God or man. In a time of war, more than at any other time, public liberty is in the hands of the public officers. And she is there in double trust : first, as they are citizens, and therefore bound to defend her by the common obligation of all citizens ; and, next, as they are her special guardians—

“ Who should against her murderers shut the door,  
Not bear the knife themselves.”

The opposing argument, when turned into plain English, means this, and this only : that when the Constitution is attacked upon one side, its official guardians may assail it upon the other ; when rebellion strikes it in the face, they may take advantage of the blindness, produced by the blow, to sneak behind it and stab it in the back.

The convention when it framed the Constitution, and the people when they adopted it, could have had no thought like that. If they had supposed that it would operate only while perfect peace continued, they certainly would have given us some other rule to go by in time of war ; they would not have left us to wander about in a howling wilderness of anarchy, without a lamp to our feet, or a guide to our path. Another thing proves their actual intent still more strikingly. They required that every man in any kind of public employment, State or national, civil or military, should swear, without reserve or



qualification, that he would support the Constitution. Surely our ancestors had too much regard for the moral and religious welfare of their posterity to impose upon them an oath like that, if they intended and expected it to be broken half the time. The oath of an officer to support the Constitution is as simple as that of a witness to tell the truth in a court of justice. What would you think of a witness who should attempt to justify perjury upon the ground that he had testified when civil war was raging, and he thought that by swearing to a lie he might promote some public or private object connected with the strife?

No, no, the great men who made this country what it is—the heroes who won her independence, and the statesmen who settled her institutions—had no such notions in their minds. Washington deserved the lofty praise bestowed upon him by the President of Congress when he resigned his commission—that he had always regarded the rights of the civil authority through all changes and through all disasters. When his duty as President afterward required him to arm the public force to suppress a rebellion in Western Pennsylvania, he never thought that the Constitution was abolished, by virtue of that fact, in New Jersey, or Maryland, or Virginia. It would have been a dangerous experiment for an adviser of his at that time, or at any time, to propose that he should deny a citizen his right to be tried by a jury, and substitute in place of it a trial before a tribunal composed of men elected by himself from among his own creatures and dependents. You can well imagine how that great heart would have swelled with indignation at the bare thought of such an insulting outrage upon the liberty and law of his country.

In the war of 1812, the man emphatically called the Father of the Constitution was the supreme Executive Magistrate. Talk of perilous times! There was the severest trial this Union ever saw. That was no half-organized rebellion on the one side of the conflict, to be crushed by the hostile millions and unbounded resources of the other. The existence of the nation was threatened by the most formidable military and naval power then upon the face of the earth. Every town upon the northern frontier, upon the Atlantic seaboard, and upon the Gulf coast was in daily and hourly danger. The enemy had penetrated the heart of Ohio. New York, Pennsylvania, and Virginia were all of them threatened from the west as well as the east. This Capitol was taken, and burned, and pillaged, and every member of the Federal Administration was a fugitive before the invading army. Meanwhile, party spirit was breaking out into actual treason all over New England. Four of those States refused to furnish a man or a dollar even for their own defense. Their public authorities were plotting the dismemberment of the Union, and individuals among them were burning blue-lights upon the coast as a signal to the enemy's ships. But in

all this storm of disaster, with foreign war in his front, and domestic treason on his flank, Madison gave out no sign that he would aid Old England and New England to break up this government of laws. On the contrary, he and all his supporters, though compassed round with darkness and with danger, stood faithfully between the Constitution and its enemies—

“To shield it, and save it, or perish there too.”

The framers of the Constitution and all their contemporaries died and were buried; their children succeeded them and continued on the stage of public affairs until they, too—

“Lived out their lease of life, and paid their breath  
To time and mortal custom”;

and a third generation was already far on its way to the grave before this monstrous doctrine was conceived or thought of, that public officers all over the country might disregard their oaths whenever a war or a rebellion was commenced.

Our friends on the other side are quite conscious that when they deny the binding obligation of the Constitution they must put some other system of law in its place. Their brief gives notice that, while the Constitution, and the acts of Congress, and *Magna Charta*, and the common law, and all the rules of natural justice shall remain under foot, they will try American citizens according to *the law of nations*! But the law of nations takes no notice of the subject. If that system did contain a special provision that a government might hang one of its own citizens without judge or jury, it would still be competent for the American people to say, as they have said, that no such thing should ever be done here. That is my answer to the law of nations.

But then they tell us that the *laws of war* must be treated as paramount. Here they become mysterious. Do they mean that code of public law which defines the duties of two belligerent parties to one another, and regulates the intercourse of neutrals with both? If yes, then it is simply a recurrence to the law of nations, which has nothing on earth to do with the subject. Do they mean that portion of our municipal code which defines our duties to the Government in war as well as in peace? Then they are speaking of the Constitution and laws, which declare in plain words that the Government owes every citizen a fair legal trial, as much as the citizen owes obedience to the Government. They are in search of an argument under difficulties. When they appeal to international law, it is silent; and when they interrogate the law of the land, the answer is an unequivocal contradiction of their whole theory.

The Attorney-General tells us that all persons whom he and his



associates choose to denounce for giving aid to the rebellion are to be treated as being themselves a part of the rebellion—they are public enemies, and therefore they may be punished without being found guilty by a competent court or a jury. This convenient rule would outlaw every citizen the moment he is charged with a political offense. But political offenders are precisely the class of persons who most need the protection of a court and jury, for the prosecutions against them are most likely to be unfounded both in fact and in law. Whether innocent or guilty, to accuse is to convict them before the ignorant and bigoted men who generally sit in military courts. But this court decided in the *prize cases* that all who live in the enemy's territory are public enemies, without regard to their personal sentiments or conduct; and the converse of the proposition is equally true—that all who reside inside of our own territory are to be treated as under the protection of the law. If they help the enemy they are criminals, but they can not be punished without legal conviction.

You have heard much (and you will hear more very soon) concerning the natural and inherent right of the Government to defend itself without regard to law. This is wholly fallacious. In a despotism the autocrat is unrestricted in the means he may use for the defense of his authority against the opposition of his own subjects or others; and that is precisely what makes him a despot. But in a limited monarchy the prince must confine himself to a legal defense of his government. If he goes beyond that, and commits aggressions on the rights of the people, he breaks the social compact, releases his subjects from all their obligations to him, renders himself liable to be hurled from his throne, and dragged to the block or driven into exile. This principle was sternly enforced in the cases of Charles I and James II, and we have it announced on the highest official authority here that the Queen of England can not ring a little bell on *her* table and cause a man by *her* arbitrary order to be arrested under any pretense whatever. If that be true there, how much more true must it be here, where we have no personal sovereign, and where our only government is the Constitution and laws. A violation of law, on pretense of saving such a Government as ours, is not self-preservation, but suicide.

*Salus populi suprema lex.* Observe it is not *salus regis*; the safety of the *people*, not the safety of the *ruler*, is the supreme law. When those who hold the authority of the Government in their hands behave in such manner as to put the liberties and rights of the people in jeopardy, the people may rise against them and overthrow them without regard to that law which requires obedience to them. The maxim is revolutionary, and expresses simply the right to resist tyranny without regard to prescribed forms. It can never be used to stretch the powers of government *against* the people.

If this Government of ours has no power to defend itself without

violating its own laws, it carries the seeds of destruction in its own bosom ; it is a poor, weak, blind, staggering thing, and the sooner it tumbles over the better. But it has a most efficient legal mode of protecting itself against all possible danger. It is clothed from head to foot in a complete panoply of defensive armor. What are the perils which may threaten its existence ? I am not able at this moment to think of more than these which I am about to mention : foreign invasion, domestic insurrection, mutiny in the army and navy, corruption in the civil administration, and last, but not least, criminal violations of its laws committed by individuals among the body of the people. Have we not a legal mode of defense against all these ? Yes : military force repels invasion and suppresses insurrection ; you preserve discipline in the army and navy by means of courts-martial ; you preserve the purity of the civil administration by impeaching dishonest magistrates ; and crimes are prevented and punished by the regular judicial authorities. You are not merely compelled to use these weapons against your enemies, because they and they only are justified by the law : you ought to use them because they are more efficient than any other, and less liable to be abused.

There is another view of the subject which settles all controversy about it. No human being in this country can exercise any kind of public authority which is not conferred by law ; and under the United States it must be given by the express words of a written statute. Whatever is not so given is withheld, and the exercise of it is positively prohibited. Courts-martial in the army and navy are authorized ; they are legal institutions ; their jurisdiction is limited, and their whole code of procedure is regulated, by act of Congress. Upon the civil courts all the jurisdiction they have or can have is bestowed by law ; and if one of them goes beyond what is written, its action is *ultra vires* and void. But a military commission is not a court-martial, and it is not a civil court. It is not governed by the law which is made for either, and has no law of its own. Within the last five years we have seen, for the first time, self-constituted tribunals not only assuming power which the law did not give them, but thrusting aside the regular courts to which the power was exclusively given.

What is the consequence ? This terrible authority is wholly undefined, and its exercise is without any legal control. Undelegated power is always unlimited. The field that lies outside of the Constitution and laws has no boundary. Thierry, the French historian of England, says that when the crown and scepter were offered to Cromwell he hesitated for several days, and answered, "Do not make me a king ; for then my hands will be tied up by the laws which define the duties of that office ; but make me protector of the commonwealth, and I can do what I please ; no statute restraining and limiting the



royal prerogative will apply to me." So these commissions have no legal origin and no legal name by which they are known among the children of men ; no law applies to them ; and they exercise all power for the paradoxical reason that none belongs to them rightfully.

Ask the Attorney-General what rules apply to military commissions in the exercise of their assumed authority over civilians. Come, Mr. Attorney, "gird up thy loins now like a man ; I will demand of thee, and thou shalt declare unto me if thou hast understanding." How is a military commission organized ? What shall be the number and rank of its members ? What offenses come within its jurisdiction ? What is its code of procedure ? How shall witnesses be compelled to attend it ? Is it perjury for a witness to swear falsely ? What is the function of the Judge-Advocate ? Does he tell the members how they must find, or does he only persuade them to convict ? Is he the agent of the Government, to command them what evidence they shall admit and what sentence they shall pronounce ; or does he always carry his point, right or wrong, by the mere force of eloquence and ingenuity ? What is the nature of their punishment ? May they confiscate property and levy fines as well as imprison and kill ? In addition to strangling their victim, may they also deny him the last consolations of religion, and refuse his family the melancholy privilege of giving him a decent grave ?

To none of these questions can the Attorney-General make a reply, for there is no law on the subject. He will not attempt to "darken counsel by words without knowledge," and therefore, like Job, he can only lay his hand upon his mouth and keep silence.

The power exercised through those military commissions is not only unregulated by law, but it is incapable of being so regulated. What is it that you claim, Mr. Attorney ? I will give you a definition, the correctness of which you will not attempt to gainsay. You assert the right of the Executive Government, without the intervention of the judiciary, to capture, imprison, and kill any person to whom that Government or its paid dependents may choose to impute an offense. This, in its very essence, is despotic and lawless. It is never claimed or tolerated except by those governments which deny the restraints of all law. It has been exercised by the great and small oppressors of mankind ever since the days of Nimrod. It operates in different ways ; the tools it uses are not always the same ; it hides its hideous features under many disguises ; it assumes every variety of form ;

"It can change shapes with Proteus for advantages,  
And set the murderous Machiavel to school."

But in all its mutations of outward appearance it is still identical in principle, object, and origin. It is always the same great engine of despotism which Hamilton described it to be.

Under the old French monarchy the favorite fashion of it was a *lettre de cachet*, signed by the king, and this would consign the party to a loathsome dungeon until he died, forgotten by all the world. An imperial *ukase* will answer the same purpose in Russia. The most faithful subject of that amiable autocracy may lie down in the evening to dream of his future prosperity, and before daybreak he will find himself between two dragoons on his way to the mines of Siberia. In Turkey the verbal order of the Sultan or any of his powerful favorites will cause a man to be tied up in a sack and cast into the Bosphorus. Nero accused Peter and Paul of spreading a "pestilent superstition," which they called the Gospel. He heard their defense in person, and sent them to the cross. Afterward he tried the whole Christian church in one body, on a charge of setting fire to the city, and he convicted them, though he knew not only that they were innocent, but that he himself had committed the crime. The judgment was followed by instant execution; he let loose the Prætorian guards upon men, women, and children, to drown, butcher, and burn them. Herod saw fit, for good political reasons, closely affecting the permanence of his reign in Judea, to punish certain *possible* traitors in Bethlehem by anticipation. This required the death of all the children in that city under two years of age. He issued his "general order"; and his provost-marshal carried it out with so much alacrity and zeal that in one day the whole land was filled with mourning and lamentation.

Macbeth understood the whole philosophy of the subject. He was an unlimited monarch. His power to punish for any offense or for no offense at all was as broad as that which the Attorney-General claims for himself and his brother officers under the United States. But he was more cautious how he used it. He had a dangerous rival, from whom he apprehended the most serious peril to the "life of his government." The necessity to get rid of him was plain enough, but he could not afford to shock the moral sense of the world by pleading political necessity for a murder. He must—

"Mask the business from the common eye."

Accordingly he sent for two enterprising gentlemen, whom he took into his service upon liberal pay—"made love to their assistance"—and got them to deal with the accused party. He acted as his own Judge-Advocate. He made a most elegant and stirring speech to persuade his agents that Banquo was their oppressor, and had "held them so under fortune" that he ought to die for that alone. When they agreed that he was their enemy, then said the king:

"So is he mine, and though I *could*  
With *barefaced* power sweep him from my sight  
And bid my *will* avouch it; yet I *must not*,



For certain friends, who are both his and mine,  
Whose loves I may not drop."

For these, and "many weighty reasons" besides, he thought it best to *commit* the execution of his design to a subordinate agency. The commission thus organized in Banquo's case sat upon him that very night, at a convenient place beside the road where it was known he would be traveling; and they did precisely what the Attorney-General says the military officers may do in this country—they *took* and *killed* him, because their employer at the head of the government wanted it done, and paid them for doing it out of the public treasury.

But of all the persons that ever wielded this kind of power, the one who went most directly to the purpose and object of it was Lola Montez. She reduced it to the elementary principle. In 1848, when she was minister and mistress to the King of Bavaria, she dictated all the measures of the government. The times were troublesome. All over Germany the spirit of rebellion was rising; everywhere the people wanted to see a first-class revolution, like that which had just exploded in France. Many persons in Bavaria disliked to be governed so absolutely by a lady of the character which Lola Montez bore, and some of them were rash enough to say so. Of course that was treason, and she went about to punish it in the simplest of all possible ways. She bought herself a pack of English bull-dogs, trained to tear the flesh, and mangle the limbs, and lap the life-blood: and with these dogs at her heels, she marched up and down the streets of Munich with a most majestic tread, and with a sense of power which any Judge-Advocate in America might envy. When she saw any person whom she chose to denounce for "thwarting the government," or "using disloyal language," her obedient followers needed but a sign to make them spring at the throat of their victim. It gives me unspeakable pleasure to tell you the sequel. The people rose in their strength, smashed down the whole machinery of oppression, and drove out into uttermost shame king, strumpet, dogs, and all. From that time to this neither man, woman, nor beast, has dared to worry or kill the people of Bavaria.

All these are but so many different ways of using the arbitrary power to punish. The variety is merely in the means which a tyrannical government takes to destroy those whom it is bound to protect. Everywhere it is but another construction, on the same principle, of that remorseless machine by which despotism wreaks its vengeance on those who offend it. In a civilized country it nearly always uses the military force, because that is the sharpest, and surest, as well as the best-looking instrument that can be found for such a purpose. But in none of its forms can it be introduced into this country; we have no room for it; the ground here is all preoccupied by legal and free institutions.

Between the officers who have a power like this, and the people who are liable to become its victims, there can be no relation except that of master and slave. The master may be kind, and the slave may be contented in his bondage ; but the man who can take your life, or restrain your liberty, or despoil you of your property at his discretion, either with his own hands or by means of a hired overseer, owns you and he can force you to serve him. All you are and all you have, including your wives and children, are his property.

If my learned and very good friend, the Attorney-General, had this right of domination over me, I should not be very much frightened, for I should expect him to use it as moderately as any man in all the world ; but still I should feel the necessity of being very discreet. He might change in a short time. The thirst for blood is an appetite which grows by what it feeds upon. We can not know him by present appearances. Robespierre resigned a country judgeship in early life because he was too tender-hearted to pronounce sentence of death upon a convicted criminal. Caligula passed for a most amiable young gentleman before he was clothed with the imperial purple, and for about eight months afterward. It was Trajan, I think, who said that absolute power would convert any man into a wild beast, whatever was the original benevolence of his nature. If you decide that the Attorney-General holds in his own hands, or shares with others, the power of life and death over us all, I mean to be very cautious in my intercourse with him ; and I warn you, the judges whom I am now addressing, to do likewise. Trust not to the gentleness and kindness which have always marked his behavior heretofore. Keep your distance ; be careful how you approach him ; for you know not at what moment or by what a trifle you may rouse the sleeping tiger. Remember the injunction of Scripture : "Go not near to the man who hath power to kill ; and if thou come unto him, see that thou make no fault, lest he take away thy life presently ; for thou goest among snares and walkest upon the battlements of the city."

The right of the Executive Government to kill and imprison citizens for political offenses has not been practically claimed in this country, except in cases where commissioned officers of the army were the instruments used. Why should it be confined to them ? Why should not naval officers be permitted to share in it ? What is the reason that common soldiers and seamen are excluded from all participation in the business ? No law has bestowed the right upon army officers more than upon other persons. If men are to be hung up without that legal trial which the Constitution guarantees to them, why not employ commissions of clergymen, merchants, manufacturers, horse-dealers, butchers, or drovers, to do it ? It will not be pretended that military men are better qualified to decide questions of fact or law than other classes of people ; for it is known, on the contrary, that



they are, as a general rule, least of all fitted to perform the duties that belong to a judge.

The Attorney-General thinks that a proceeding which takes away the lives of citizens without a constitutional trial is a most merciful dispensation. His idea of humanity as well as law is embodied in the bureau of military justice, with all its dark and bloody machinery. For that strange opinion he gives this curious reason: that the duty of the commander-in-chief is to kill, and unless he has this bureau and these commissions he must "butcher" indiscriminately, without mercy or justice. I admit that if the commander-in-chief or any other officer of the Government has the power of an Asiatic king, to butcher the people at pleasure, he ought to have somebody to aid him in selecting his victims, as well as to do the rough work of strangling and shooting. But if my learned friend will only condescend to cast an eye upon the Constitution, he will see at once that all the executive and military officers are completely relieved by the provision that the life of a citizen shall not be taken at all until after legal conviction by a court and jury.

You can not help but see that military commissions, if suffered to go on, will be used for most pernicious purposes. I have criticised none of their past proceedings, nor made any allusion to their history in the last five years. But what can be the meaning of this effort to maintain them among us? Certainly not to punish actual guilt. All the ends of true justice are attained by the prompt, speedy, impartial trial which the courts are bound to give. Is there any danger that crime will be winked upon by the judges? Does anybody pretend that courts and juries have less ability to decide upon facts and law than the men who sit in military tribunals? The counsel in this cause will not insult you by even hinting such an opinion. What righteous or just purpose, then, can they serve? None, whatever.

But while they are utterly powerless to do even a shadow of good, they will be omnipotent to trample upon innocence, to gag the truth, to silence patriotism, and crush the liberties of the country. They will always be organized to convict, and the conviction will follow the accusation as surely as night follows the day. The Government, of course, will accuse none before such a commission except those whom it predetermines to ruin and destroy. The accuser can choose the judges, and will certainly select those who are known to be the most ignorant, the most unprincipled, and the most ready to do whatever may please the power which gives them pay, promotion, and plunder. The willing witness can be found as easily as the superserviceable judge. The treacherous spy, and the base informer—those loathsome wretches who do their lying by the job—will stock such a market with abundant perjury, for the authorities that employ them will be bound to protect as well as reward them. A corrupt and tyrannical govern-

ment, with such an engine at its command, will shock the world with the enormity of its crimes. Plied as it may be by the arts of a malignant priesthood, and urged on by the madness of a raving crowd, it will be worse than the popish plot, or the French revolution—it will be a combination of both, with Fouquier-Tinville on the bench, and Titus Oates in the witness's box. You can save us from this horrible fate. You alone can “deliver us from the body of this death.” To that fearful extent is the destiny of this nation in your hands.

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UNITED STATES *vs.* BLYEW *ET AL.* (CIVIL RIGHTS BILL).

IN THE SUPREME COURT OF THE UNITED STATES.

If your honors please, this is a capital case. The plaintiffs in error have been sentenced to death, and that doom is impending over their heads at this time. Usually a cause which involves the life of a human being has a certain degree of solemnity thrown around it by that fact alone. Not much, however, has been said about it here, probably because there has been a general impression made of the prisoners' guilt. The State of Kentucky accuses them, the United States have convicted them, and no counsel employed by themselves are here to defend them. I admit nothing against them. No man in a court of justice can properly say of another that he is guilty of murder, or any other criminal offense, until he has been convicted upon a fair trial before an impartial jury and a court of competent jurisdiction; and such a trial these men have not had, if I understand the subject rightly.

It is the question of conflicting jurisdiction between the State and Federal courts which gives interest and dignity to this cause. The decision which you may make on it will be felt in its influence on the destinies of the country long after you and I and all of us shall have mingled with the clods of the valley. Every question of constitutional law is important when it comes to be decided by the tribunal of last resort, from which there is no appeal except to the sword; and if there be any one case that is more important than all others, even of that kind, it is one in which the supreme judicial tribunal of the country is required to draw the line of demarcation between the powers of a great central government on the one hand and the local rights of self-government retained to the States and the people on the other. If some future Hallam shall write the constitutional history of America, I know of nothing more likely than this to occupy a prominent place on his pages. I hope and I believe he will be able to say with truth that you have been equal to your duty.

I can not, or rather I *will* not, follow my learned friend, the Solici-



tor-General, where he has traveled so far out of the record, as I think he did when he indulged in that eloquent denunciation of the State of Kentucky. You would suppose, from what he and the Attorney-General have said, that the people of Kentucky are engaged in a constant and barbarous warfare upon the black population. They would have you to believe that that State, and the administration of the laws in the courts, encourage and protect the whites in the perpetration of every outrage on persons of African descent. The Solicitor-General distinctly asserted that under the laws of Kentucky a white man *had a right* to go into a negro church and kill the minister in cold blood. The Attorney-General expands this statement, and says that every man, woman, and child in the congregation may be killed with perfect impunity. They would have you to believe not only that these outrages may lawfully be perpetrated, but that they are habitual practices. The cannibals of New Zealand are mild and merciful in comparison with the Kentuckians, if you take the picture of them which the law officers of the United States have painted. But all this, you must observe, is mere general abuse, not only without proof, but without specification. They produce no evidence of their assertions, and they mention no instance of any act which, if true, would justify them. I take leave to contradict these denunciations in all their length and breadth. They are utterly without foundation. The people of Kentucky have behaved toward the Africans among them with uniform kindness, with perfect justice, and with all the magnanimity which ought to mark the conduct of the superior race to the inferior and the weaker. The laws may not be perfect; I know of no human code that is: but thus far there has been no failure of justice to the negro on that account, much less has there ever been any instance of wrong from the partiality of the courts. By the whole body of the people, by those who make the laws and by those who administer them, crime is regarded as no less a crime when negroes have suffered by it than whites. I am instructed to say, and I do say with perfect confidence, that in no case has justice been denied or delayed to any person, white or black, except where it was caused by the interference of the Federal authorities. This act of Congress, called the "Civil Rights Bill," has dislocated all the machinery of the State courts, and rendered them powerless to perform their duty. If they attempt to execute justice, the judges themselves are liable to be hunted down as criminals. The jurisdiction of the State courts is entirely taken away in every case which affects a negro in any way whatever, and yet the officers of the United States come into this court, and with their feet on the neck of the prostrate commonwealth, vent curses and maledictions and oburgations upon her for not doing justice to the negro!

A person standing where I stand might be tempted to follow the



Solicitor-General out of the record, and enunciate some general doctrines not altogether unprofitable for reproof and for admonition to Federal officers. But I make no appeal to the passions. Let the stump and the newspaper do that. One who desires to speak upon this case within the record, and directly to the points before the court, will find himself restricted to a narrow compass. What I have to say upon it, therefore, will be said briefly; I hope it will be said intelligibly and plainly, as befits the discussion of a subject so entirely simple as I believe this to be.

The facts which you are required to keep in your memory can be stated in a breath. A murder was committed in a remote county of the State of Kentucky. When I say "remote," I do not mean that it was wild or uninhabited, but that it was a rural district, far away from any great thoroughfare of travel, or any great center of trade and population. It was accompanied with circumstances of unusual atrocity, calculated to excite the alarm and indignation of the whole neighborhood, and all who heard of it. But it was committed within the limits of the State of Kentucky, and on her soil, within the body of a county. It was an atrocious insult to her dignity, and the grossest possible outrage upon the peace of that community, which, by the organic law of this land was placed under her sole protection. Her law and the law of God alone were offended by it, and none but the Almighty and the State of Kentucky had a right to enter into judgment with the perpetrators of it. No other State, or sovereignty, prince, or potentate on the earth had made, or had the power to make, any law which would punish that offense at that place. The United States never pretended that they had legislative jurisdiction on the subject, never declared a murder within the limits of any State to be an offense against them. It was no more an offense against the United States than it was against the Republic of France, or the Empire of Germany.

The people and the public authorities of the State took the measures that were proper and necessary in the premises. They ascertained, or supposed they had ascertained, who the murderers were. They followed them, overtook them, arrested them, carried them before a magistrate, by whom, after a preliminary examination, they were committed—committed only in the way that a State magistrate had a right to commit them—to the jail of the proper county, to await their trial before the only court which, by the laws of Kentucky, had a right to try and to punish them. How long they were there I do not know. I know nothing upon that subject except what appears upon the record, and what was stated here by the Solicitor-General yesterday. One thing, however, is certain: that before a trial could be had in the regular course of justice, these men were taken away, out of the custody of the officer who held them, and carried beyond the reach of the State authorities.



If I were to stop just there, say no more about it, and you had no means of getting any information except what I have given you, the natural, the necessary conclusion would be that this rescue of the prisoners had been made by a lawless mob, composed either of their friends, who desired to give them a chance of escape, or else a mob made up of their enemies, whose hot thirst for their blood would not wait for the slow vengeance of the law. The Solicitor-General said there was a mob in the case. I did not know that before; but it was not a mob that carried them away. They were not taken out of jail by any band of regulators nor by any committee of vigilance. It was the United States marshal who did that deed, and did it, I presume, in pursuance of what he supposed to be his duty; he transported them to Louisville, a distance of one hundred and fifty or two hundred miles, there to be tried, not by a Lynch court, but by the Circuit Court of the United States; and there they were tried. The public accuser of the United States for that district appeared against them, and preferred an indictment to the grand jury, which was found a true bill. This indictment charged them not simply with murder, but with murder upon a person of the African race. The averment was added that a witness was present of the same color, who saw it done. Then he charged them, as a further aggravation, with being white men. All these unusual charges are true. The murder, by whomsoever committed, was on a negro woman; a negro witness saw it; and the prisoners are guilty of a skin not colored like that of the African. Upon these grounds the District Attorney insisted that this offense against the State of Kentucky was triable in the courts of the United States. His ingenious eloquence enabled him to convince that court that it had jurisdiction, and he is here now in the shape of a Solicitor-General to convince you that you ought to affirm the judgment.

If the Circuit Court of the United States had the jurisdiction which was claimed for, and exercised by it, then the State is utterly disarmed of the power to protect her own people against a very large class of criminal offenders, or to defend her own existence against any assault that may be made upon it; the most important function of a free State is wrested from her and delivered over to the officers and agents of another and a different government, which may or may not be administered by total strangers to the State—perhaps the bitter enemies to her peace and prosperity—men who think it a crime to sympathize with her people—men who would “laugh at her calamity and mock when her fear cometh.” It is hard that a blow like this should have come from the distinguished gentleman who has given it so much force both here and in the court below. I think he is proud of his State. He nods his head. He ought to be, for there are portions of her history which would honor any nation in the world. The State is proud of him too; at least, I suppose that there is, as



there ought to be, a good deal of mutual admiration between them. He can hardly be conscious that he has a rope around the neck of his political mother, and that every pull he makes upon it is choking the life out of her body.

However, we can not get either him or his chief to understand the subject as we do. It is necessary, therefore, that we should call your careful attention to the consequences which must result from your affirmance of this jurisdiction. You will know that we are not making a mere captious objection to a measure enacted by Congress, but standing in the defense of those rights without which the State must cease to be a State.

Neither of the gentlemen on the other side has raised, but, on the contrary, both have refused to raise, or rather they have evaded, the question whether the law of 1866 gives to the Federal courts *exclusive* jurisdiction of the cases within its purview, or whether it is concurrent with the State courts. I am somewhat surprised to find them halting between two opinions on a point like that. The jurisdiction is exclusive beyond all possible doubt. There are, as they have truly said, two classes of cases here of which jurisdiction is given to the Federal courts. One consists of those cases which arise under the law itself, such as are created, defined, and made punishable by the act of Congress—an indictment, for instance, against a judge for administering the law of Kentucky according to his oath. Of this first class exclusive jurisdiction is given in terms to the District Court of the United States. There is another class of cases for which no Federal law has provided any punishment, cases which arise wholly and entirely under the State law—such a cause as the one before you. Of these jurisdiction is given to the District Court to be exercised by it *concurrently with the Circuit Court of the United States*. Now, when you give jurisdiction to one court concurrently with another, *ex vi termini*, that excludes all other courts. You can not say that there is a concurrent jurisdiction between two courts and mean to say that another court has also concurrent jurisdiction.

Besides that, it is very clear that the reason why this jurisdiction was to be taken in any case from the State courts and given to the Federal courts was because Congress thought it not proper to trust the State courts with the decision of any case which might affect negroes, mulattoes, or persons of African descent. That general intent and purpose of the law would be wholly defeated if the State courts had concurrent jurisdiction in every case where they, by superior vigilance, activity, or force, would be able to get possession of the party first. Congress could not have meant to give two different and hostile sets of courts a scrambling jurisdiction, to be contended for like a piece of wild land on the Western frontier, where one squatter has title as long as another does not "jump" his claim. It could not have



been meant to reduce a question of jurisdiction in criminal cases to Rob Roy's rule, that—

“He shall take who hath the power,  
And he shall keep who can.”

Then it is an exclusive jurisdiction in the *Federal* courts, and a total denial of all right on the part of the State courts to intermeddle in any case which *affects* the negro race. That is the result of this law, if it be valid and constitutional. It does of course affect the negro race whenever one of them is a party. By the construction of our opponents, negroes are also affected, and, as a consequence, the State is deprived of its power to try or punish white offenders in every case where the crime, at the time of its commission, incidentally produced injury to any person of that color, although the proceeding is not instituted to redress the private injury, but only to vindicate the State against a public wrong. And they assert that it also affects them in every case where any person of the African race or color may be a witness to prove the crime with which a white man is charged.

It does not matter whether the testimony of the black witness is important or unimportant. The same fact may be testified to by a hundred white witnesses of credible character, but if there be a black one, no matter how unnecessary his evidence is to the conviction of the party accused, that is sufficient, *proprio vigore*, to oust the jurisdiction of the State courts and vest the exclusive jurisdiction in the Federal courts. If a fight takes place at a militia muster, or a cross-roads meeting, or a general election, or a barbecue, or at any other public gathering, in the presence of a thousand white persons who can testify to it, though it concern nobody but white men, though it is between white men entirely, they can not be indicted for the offense in a State court if one single negro or mulatto in that whole crowd saw the thing done. If a negro is indicted, along with others, for being in the affray, it goes, of course, to the Federal courts. If a white man is taken up for a crime against the State, indicted, arraigned, and his guilt clearly proved by white witnesses, he can defeat the jurisdiction, and entitle himself to an acquittal, not by proving that he is innocent of the offense, but by proving that he is guilty, and that the crime was done in the presence of a negro. If the law of Congress be valid, and that be the true construction of it, any man that pleases may start out with a pre-expressed determination to commit any crime he pleases against the State of Kentucky, with perfect immunity from the State authorities, if he will simply take a negro along with him when he does the deed; and if he is not so happy as to have done it in the presence of one of that race, all he needs to do is to hunt up a black man and make a confession in his presence.

This is an intolerable grievance, which no State can suffer without groans and tears, even if it were confined to great cases, where the public alarm would insure punishment in the Federal courts ; but it extends to the smallest and the lowest cases ; to that minute distribution of justice which is made by the local magistrates in the townships ; to assaults and batteries ; to small thefts ; to the slightest breach of police regulations which the law calls a crime. Upon the prompt and speedy punishment of such offenses as these, the peace of neighborhoods and the morals of the people depend far more than on the decision of great causes. But in none of these can the State courts administer justice if a negro be affected. The District Court of the United States for Kentucky is filled now with cases of assault and battery and petty larceny, brought from every part of the State. I do not wish to speak disrespectfully of any of my friend's friends, but I must be permitted to say (what I have the highest authority for saying) that negroes have a powerful bump of acquisitiveness in little things, which results frequently in producing a decided proclivity to stealing. The Solicitor-General says that the African race have been Christianized and civilized by our benign institutions—by which I understand him to mean slavery ; but he will not pretend, I think, that slavery or anything else has taught them the difference between *meum* and *tuum*. Nor will they ever learn it unless the knowledge is forced upon them by the law. But this act of Congress deprives them of the lessons which they might otherwise receive in that stern but wholesome school.

If a negro steals a hog, or robs a hen-roost, the suffering party must let him run unpunished or else go to Louisville for justice, and that would cost twenty times as much as the pigs and chickens are worth. The consequence must be that nine tenths of the lower class of crimes committed by negroes, and by white men under the protection of negro witnesses, must go unwhipped of justice. The people become totally demoralized ; they graduate in crime from the lowest to the highest, and society is altogether broken up.

Under this law, a State court in Kentucky is not able to enforce a decree, sentence, or judgment of its own, even in a case which is admitted to be within its sole jurisdiction. Any black gentleman, who chooses to say that it shall not be carried into effect, can strike the process dead in the officer's hands ; and a white man may do it also if he does it in the presence of a negro. The judge thus insulted may go up to Louisville and ask the Federal court to punish the contempt. I do not know what answer would be given ; but a proper answer would be, that no contempt can be committed against the courts of Kentucky, because they are utterly contemptible already in the eyes of the Federal law.

The State of Kentucky can not, by the aid of her judicial authori-



ties, parry the lunge of the most atrocious assassin who chooses to aim his weapon at her heart. She can not punish treason against the State. A band of negroes and white men, either, or both united, may organize themselves into "ranks and squadrons, and right forms of war," and march upon the capital with an avowed determination to depose the Legislature and the Governor, and to establish somebody else in their place, or to create a civil war which shall cover the whole commonwealth with blood and ashes, and although they be taken red-handed before they have accomplished the forcible overthrow of the government, they can not be punished in the State courts if any negro saw the overt act, much less if he was a part of the insurrection in his own person.

There is another curious anomaly created by this law, to which I shall ask your attention, simply because it is a puzzle. I know how ingenious your honors are, but I do not believe there is a man among you that will untie this knot. Where is the pardoning power in a case like the present? Has the President a right to pardon an offense against the State of Kentucky? No. By the Constitution he is especially limited in the exercise of that power to "offenses against the United States," that is, offenses defined and made criminal by the laws of the United States. On the other hand, suppose the Governor of Kentucky, while this cause was pending, had sent his pardon and put it into the hands of the accused parties, and they had pleaded it, would the Federal court have sustained that plea? Or, suppose that after they had been convicted, and they were in the hands of the marshal for execution, the Governor had sent a pardon to him? The marshal would have treated it with contempt. He is acting under the sentence of a Federal court, and is not bound to obey the executive of the State when he tells him not to carry it into effect.

It is no answer to this to say that the State of Kentucky might relieve herself if she would change a certain law, which the Attorney-General and the people of other States have seen proper to disapprove. That is her own business. The rules of pleading and evidence which she may adopt depend, and ought to depend, upon the discretion of her own Legislature. Congress itself does not deny that her people may say what the barons of England said on an occasion equally memorable concerning a code far more obnoxious to censure—*nolumus leges nostras mutare*. Assume the law in question to be wrong—concede that the people of the State close their eyes upon the error—admit that they stubbornly refuse to be lashed into a repeal—something should be pardoned to the spirit of independence which they have inherited from their forefathers. No community, long accustomed to freedom, will ever be driven into measures by the dictation of those who have no right to intermeddle with them. All men claim the privilege to do as they please in regard to those things which concern

nobody but themselves. Coercion like this has never yet accomplished a good purpose.

Men will not *reason*, they only *feel*, when they see the whip of a master held over their heads. After the laws for the punishment of heresy were enacted, in the reign of Philip and Mary, Archbishop Bonner went to Ridley and proposed to convince him of his error. But Ridley said: "I can receive no instructions from a man who comes to me armed with a law which enables him to put me to death if I do not agree with him; repeal your penal laws against me and my brethren, and then we will hear you with pleasure." Laws similar to this were made and carried into execution for centuries against Ireland, with the hope of extirpating the Catholic religion; but it only made them cling with more tenacity than ever to the faith of their fathers. The morning after the Catholic Emancipation Bill was passed, Tom Moore, the poet, took up a newspaper in which the fact was announced. "It is passed," said he, "and now, thank God, I can turn Protestant if I please," by which he meant to say, as he afterward explained it, that up to that time it was a point of honor with him to stand by the old Church right or wrong. But as soon as the penalties were removed, he took up the subject and considered it as he had never considered it before.

Equally in vain is it to say that the administration of justice by the Federal courts will be just and proper. I have no right to say that anybody connected with the United States Government in Kentucky has done anything that was intentionally oppressive or cruel, or meant to produce the disorders which have resulted from this law. I believe that every case which has been tried in the United States courts there has been disposed of conscientiously. But it is impossible for a single court, situated upon the banks of the Ohio River, with a great State extending three hundred or four hundred miles around, to administer that local justice upon which the peace of every county and township depends. The people can not afford to go there for justice; they would rather do without it. Then, again, everybody revolts against the idea of having the domestic affairs of his community interfered with by persons who, however good they may be, are strangers to them, and whose rule is forced upon them against their will.

The autonomy of a free State is not a thing to be trifled with. It has been contended for by every friend of liberty in all past time. When Megara and Corinth and Thebes lost that they lost everything, and Athens justly forfeited her own independence by trampling on that of the other Greek cities. The free towns and small principalities of Western Europe were contented and prosperous as long as they retained the right to administer justice among themselves, and as soon as some great power took that away they either sunk into abject slavery or else were given over to the most frightful disorders. This sys-



tem of imperial regulation in domestic affairs was tried well in Ireland for two hundred and fifty years, and for twenty-five years it was tried equally well in the southern departments of France. What did it produce? White-boyism in one country and Chouannerie in the other.

In the worst days of the Roman Empire it was an established rule that the local customs and local tribunals of the provinces should not be interfered with. Rome sent her pro-consuls everywhere, and they behaved badly enough sometimes; but it was their prescribed duty to abstain from all interference in mere local affairs. You have a case on that point reported in a book which I am sure some of you have read. When Gallio was the Roman deputy for Achaia, with his headquarters at Corinth, a set of pagan scallawags and carpet-bag Jews caught the Apostle Paul and brought him up on a charge that he was disturbing the peace by preaching a false religion. But Gallio answered: "If this be a question of words and names and *of your own law*, look *ye* to it, for I will be no judge of such matters"; and the report adds that "he drave them from the judgment-seat." Afterward, when Paul's accuser was riotously assaulted in the streets, he declined to take jurisdiction of that offense. "Gallio cared for none of these things." The imperial government did not send him there to boss the police jobs of the city. Tiberius was the worst of the Cæsars, but he made it the boast of his reign that he had not disturbed any separate community in the enjoyment of their own laws, or interfered with the local tribunals in the administration of justice. Base as he was, he understood the philosophy of jurisprudence well enough to know that no people were ever contented, happy, or prosperous, unless they were permitted to regulate their own affairs.

When the Bourbons were restored in 1815, the king was re-invested with all the powers of the old French monarchy. But he was obliged to make a solemn promise, by treaty with his subjects and with his allies, that he would never deprive the people of the right to be tried by their natural judges; that is, the local magistrates, who, living *among* them, were responsible *to* them for the righteousness of their decisions.

But if the State of Kentucky is placed by the Federal Constitution in this unfortunate predicament, I can not help her and neither can you. I propose to show, therefore, that this act of Congress is a sheer, naked, flat breach of the Constitution. My proposition is, that the judicial as well as the legislative and executive powers of the United States are defined and limited, and that the limitation upon the judicial power is such that no right exists or can be vested by Congress in the Federal judges to try a case like this one at bar, or any case at all like it.

The judicial power of the United States, granted in the Constitu-

tion to this Government is defined by, and limited in, the Third Article. The first section declares that, "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish." That is a limitation; you have so decided. There is no other way in which the judicial power can be exercised. It can not be delegated to a star chamber, a high commission, an ecclesiastical council, or a board of military officers, nor to any other special tribunal improvised for the conviction of particular individuals. All power to hear, decide, and adjudicate, in civil or criminal cases, is confined to the ordained and established courts.

The amount, quantity, extent of the judicial power which is given to the United States, to be exercised by their courts, is defined and limited with equal clearness by the second section of Article III. What does it say? "The judicial power shall *extend*"—mark the language; there is no English word more significant for the purpose of creating a limitation: "the judicial power shall extend," how far? Thus far, and, of course, no farther—"to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign states, citizens, or subjects."

You can not make any kind of a mistake about the cases over which the judicial power of the United States constitutionally reaches. It depends sometimes upon the nature of the subject-matter, sometimes upon the character of the parties, and sometimes upon the relation of the parties to one another; but no man will risk his reputation for sanity by saying that the power described there extends to the trial of a case like this. It can not be ranged under any head which the Constitution enumerated. You have, then, the judicial power of the United States limited, and limited so as not to reach this case; and in a government of enumerated powers, whatever is not given is withheld. *Expressio unius exclusio est alterius*.

But our learned friends on the other side protest against a strict construction. They think that the powers of the Federal Government ought to be as liberally interpreted as possible. I do not know exactly what they mean by a strict construction. I am not asking for any construction that would have been called strict by the public men of Virginia at the time when that State was in the habit of furnishing Presidents to the Union. I do not ask you to believe in Washington,



and Jefferson, and Madison, and Monroe, and Jackson, or any disciple of that set whose opinions were the standard of political orthodoxy for seventy years. I believe, in my heart and conscience, that they were right. They were the best and wisest men that ever lived in all the tide of time. Among the statesmen called great in these degenerate days not one is worthy to stoop down and unloose the latchet of their shoes. If there is consecrated ground on all this earth it is the tomb at Mount Vernon, the sepulcher at Monticello, and the grave at the Hermitage. But I would not endanger any cause at this time of day by trying to sail as close to the wind as they did. I will not ask you even to adopt the notions of such men as Hamilton and Adams, or Clay and Webster, who were supposed to be rather loose in their ideas of construction. I shall not cite anything from Marshall or Taney. We are an enlightened people. We have voted ourselves to be so, and we have learned to feel a wholesome contempt for our fathers. Therefore I consent, for my part, that when you find any opinion more than ten years old, you shall discard it at once, and cast it aside among the rubbish of the Dark Ages. But this is what I do ask—this we have a right to demand—this we are sure to get, as long as the Supreme Court is allowed to stand, and as long as the Constitution is not formally abolished: that is an *honest* construction of the written organic fundamental law which we all swear to support—such just and fair interpretation of the Constitution as any right-minded man would give to any instrument containing a grant of anything, whether it be property, corporate privileges, or political power.

By every rule of interpretation that ever was invented—by every canon of construction known among civilized or barbarous men—by every principle of law and logic—by that good faith which holds the moral world together—by that decent respect which every honest man is bound to feel for the common sense of his fellow men—you are compelled to say that nothing can be taken under a grant which has not been given it. That is not only the natural construction of this grant, but it is expressly declared by the instrument itself that it shall never receive any other. The Tenth Amendment says that “the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” The oath which binds us to support the Constitution compels us to give it that interpretation. Look also at the Ninth Amendment. Certain rights had been expressly mentioned as belonging to the States and the people in the Constitution, and, in order that the force of the general words of reservation might not be weakened by the mention of these, it was declared that “the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.” The framers of the Constitution dreaded the absorption of the State authority and popu-



lar liberty by the Federal Government, and they did all that human wisdom could do to prevent it, and they took away all color of legal excuse from every construction which might be used to do it.

You may adopt the loosest construction you can so that it be a construction. Take all the power that is granted according to the most extended signification of the words. Stretch the meaning, as far as you possibly can, of every syllable which adds to the power of the General Government. After doing this, take all the additional power that your utmost ingenuity can conceive of as necessary to carry the others into effect. Then narrow down the sense of every word that expresses or implies a right on the part of States or people. Do everything that can be done by construction to magnify and increase the central authority—do nothing for liberty—let every claim for self-government be discountenanced as much as possible. Let the powers thus accumulated and extended by construction be left in the hands of the Federal officers to be guarded, as no doubt they will guard it, with “love strong as death, and jealousy as cruel as the grave.” But after you have gone as far as any kind of construction will carry you in that direction, we ask you to stop. Do not take what is neither expressed nor implied in the grant, for that is not *construction*, but *destruction*. We stand upon the outer limits of the Constitution and implore you not to pass that border.

I think I can illustrate my idea of these different sorts of construction by reference to a very old grant, I believe the oldest one on record of which the terms are distinctly made known.

About the time of the Trojan war, or a little before, a Phœnician king was assassinated in the city of Tyre. His widow was compelled to leave the country, and she led out a considerable colony. They sailed down the Mediterranean, until they came to a place on the northwest coast of Africa, which was afterward called Carthage. There they concluded to make a settlement. But the difficulty was to get a foothold in the country; for the native princes and people had full dominion over all the region round about. After some bargaining they got a grant, the limits of which were rather curiously defined. It authorized the grantees to take as much ground as could be inclosed by a certain number of bulls' hides. Inside of that space the Tyrians were to have political jurisdiction, as well as a proprietary right to the soil. But it was expressly agreed, and all parties swore to observe the compact, that all the land outside of the bull-skins should belong forever to the original owners, and be controlled by their own governments. In other words, the powers, privileges, and property, not included in the grant, were reserved to the states respectively and the people who were the grantors. The strict, that is to say, the honest construction of this grant would be to take the hides just as they came from the beasts' backs and lay them down, touching one another



in a circle or a square. There is a poetical tradition that one of the queen's counselors proposed to do this ; but he was an old-fashioned Jeffersonian, and his advice was not adopted. The latitudinarians cut the hides up into the narrowest thongs they could make, tied them together, and in that way included as much land as they needed for a large city, with a great deal of outlying territory besides. That is what I call a loose construction of Dido's grant : but still it was a construction. It showed some respect for the grant itself ; that while they were not willing to be confined within, perhaps, the just limits of it, they still acknowledged the obligation to stay inside of it, according to some rule. After awhile, however, they set at naught even their own construction, and basely used the granted power to strip the grantors of the rights reserved. They went over the lines set by themselves, and took possession of everything. From that day to this "Punic faith" has been the synonym of treachery and falsehood all the world over. The law officers of the United States are now asking you to sanction an act of their Government precisely analogous to that which made Carthage a proverb and by-word for cruelty and shame.

The States and the people made a distribution of all the power which belonged to them. Some was bestowed on the General Government, and some was retained by the people and given to the States, or kept in their own hands and excepted forever out of the powers of all governments. If this be true, and if it be also true that all parties swore to observe the distribution just as it was made, that is to say, that the States should remain undisturbed in that portion of the judicial, legislative, and executive power which was not granted to the United States, and that the United States should hold, not for a day, but for all time, the powers that were granted to them, I want to know why it is any worse or any better to tear away the power allotted to the States, than it is to take from the Federal Government a function bestowed upon it. If the line of demarkation that was agreed to be observed between the States and the General Government is to be observed at all, is it not just as bad to pass it in one direction as it is in the other ?

If a State says she will not abide by the distribution, but that she will take back and re-assume what was granted to the General Government, that is manifest usurpation ; and if she proceeds to maintain it by any show of military force, every individual concerned in it is guilty of treason. Now, will anybody tell me why it is not treason against the State for officers of the General Government to usurp upon a State by forcibly taking away from her the rights plainly reserved ?

There is one argument against the States which may have much influence with some persons. It comes, I believe, from Talleyrand, who laid it down as a rule that "the weak are always in the wrong." Certainly the United States are stronger than any State of this Union.

They have more men, more money, and a better organized physical force to maintain any usurpation which they resolve upon. Public men who desire to have their talents well rewarded are sorely tempted to serve the Federal power. But "we, the people," who are not politicians, and who ask nothing of any government except the privilege to earn our bread and eat it, do not understand that argument at all, and we never will; nor do I see how it addresses itself with any force to the conscience of a judge.

If the judicial power of the United States is so limited that it does not extend to a case of this kind, how can you justify the assumption of it?

Of your own head you can take no power which the Constitution has left in the hands of the States, and neither can Congress increase your power. All the departments of the Government can not increase the power of any one.

My learned friends do not find, or pretend to find, any grant of judicial power which covers a case like this in the body of the Constitution, nor in any of the first twelve amendments. The Fourteenth and Fifteenth are also out of all question, for they were not adopted when the act of 1866 was passed. They found their claim of jurisdiction solely on the Thirteenth Amendment. If that enlarges the judicial power, or sets the line out so far as to take in a case like this, we have no more to say. But not a word is there to change the original distribution of the judicial authority. The power of the State is left untouched to administer her own laws for the prevention of crime and the preservation of order among her own people. When, therefore, they come with their knife to cut this pound of flesh from the bosom of the State, I tell them "it is not so nominated in the bond." But then they tell us that it is *implied* from the necessity of carrying the Thirteenth Amendment into effect.

The Thirteenth Amendment has no kind of connection, legal or logical, with the Civil Rights Law of 1866. That amendment executed itself. It abolished slavery or involuntary servitude, except as a punishment for crime. The moment it was adopted the relation of master and servant, as it had previously existed in the Southern States, was dissolved. The statute does not profess to be based on the amendment nor to carry out the abolition of slavery. It speaks of slavery as a thing of the past—as a "previous condition" of certain persons. My learned colleague has demonstrated, by reasoning and authority which no man can answer, that such legislation as this of 1866 is most inappropriate, improper, and unnecessary to carry out anything contained in the Thirteenth Amendment. I leave that part of the argument where he put it.

But I said I would not object to a loose construction of the Constitution, and I will not go behind my word. I therefore assume, for



the argument's sake, what is manifestly not true, that the Thirteenth Amendment required some act of Congress to carry it into effect; that Congress had a right to determine what law was best for that purpose; that no matter how unnecessary or inappropriate or improper this law may appear to you, if Congress chose to adopt it as a means of carrying out the amendment, that fact alone made it "the wisest, virtuousest, discreetest, best" that human sagacity could have devised. In other words, you are to presume that everything is necessary—everything is appropriate which Congress chooses to enact. Let it be conceded that you can not even inquire into the necessity of the law, nor deny its fitness, but that we must just take what is given to us and "ask no questions, for conscience sake."

If that construction is not loose enough, I desire my friend, the Solicitor-General, to tell me how I can make it looser, for he shall have it as loose as he pleases, so far as this case is concerned. He shall not say that we hold back the car of improvement in the principles of interpretation.

But there is one barrier which he can not break—one limitation which he will not stand up and say that anybody has a right to transgress. The legislation to carry out one part of the Constitution must not violate another part; it must be within the scope of the Constitution, consistent with its general principles, and not either expressly or impliedly prohibited. That is fatal to this act, for the jurisdiction it gives to the Federal courts in matters purely of State cognizance is a clear breach of the Third Article.

If that were not the rule it would always be a question between the two parts of the Constitution which should break the other down. You could resolve the whole Constitution into any one article or one clause, and, on pretense of carrying that out, with the unlimited power of Congress to determine what is appropriate, you can do anything. You can establish a national church; you can destroy the obligation of all contracts, make *ex post facto* laws, pass bills of attainder, confiscate men's property behind their backs, and organize a general system of military commissions instead of the courts, or you can let the courts stand and extend the judicial power over every conceivable case that may arise under the laws of the States; you can clothe the President with the powers of an absolute monarch; you may suspend the writ of *habeas corpus* indefinitely, by a total repeal of the law which allows it, abolish the right of trial by jury, and make a criminal code for the States as bloody as that of Draco, or you may take away all protection from property and life by declaring that theft and murder shall be counted among the virtues. I do not say that these things would be done. I think they would not be done immediately. But I do say that when you go over the line to which the Constitution limits you, and take possession, upon any pretext whatever, of that

unbounded field of power which lies outside, this Government must become an absolute despotism in theory and in practice. The States and the people may be mercifully dealt with, but they will have no rights which their rulers here are bound by law to respect.

I think I have shown that the judicial power of the United States does not extend to the punishment of offenses against the State; that the power to do that is reserved to the States; and that to take this power away from the States and vest it in the Federal authorities is a flat violation of the Third Article. You have, therefore, only one alternative; and that is to say either that the act of Congress is void, or else that the Constitution is not binding.

But I do not admit that this case is within the act of Congress. The act gives jurisdiction to the Federal courts in "civil and criminal cases affecting" the black race. Does this affect them?

The victim of the murder was black, and one or more of the witnesses were of the same color. I am not going to repeat (for I could not do more than repeat) the argument of my colleague [Mr. Caldwell] upon the distinction which has been taken between the words "cause" and "case." You will not see the State of Kentucky impaled alive upon a pin's point so sharp as that.

But that is not the important word in the sentence. The construction turns on the meaning of the word "affect," and this court decided long ago, in the United States *vs.* Ortega, that a criminal case (or cause) affects nobody but the party accused and the public. That decision, indeed, is an old one, but I suppose the war has not changed the English language. At all events this is a point on which you have Moses and the prophets, and if you believe not them you would not believe though one rose from the dead.

It is argued, however, that the words of this act must not be understood in their popular or their legal sense, because that would confine its operation to cases in which negroes are accused, and this, it is said, would be inconsistent with the well-known feelings of Congress and that portion of the people whom Congress then represented. I am willing to admit that this law was passed under the influence of violent party passions, which took the form of extreme enmity to the white people of the South, and ultra benevolence, it may be, to the blacks. But I deny that you can incorporate these passions into the statute by mere construction. The law must be interpreted *ex visceribus suis*. The Legislature speaks to the country only through the statute-book. But why is it inconsistent with the supposed feelings of Congress to take Federal possession only of negro cases? It was negroes alone that they desired to protect against the alleged severity of the State courts. This act of Congress makes persons of the black race citizens of the State, and then takes away from the State all power to enforce upon them the duties and obligations of citizens. To ac-



compish this, wna more was necessary than to order that no State court should punish any negro for any violation of a State law? Was not this carrying their party passions into effect by appropriate legislation? And was not this exactly what they did when they declared the State courts incapable of trying any cause which *affects* negroes?

Another authority is cited by our opponents—that of Alexander the Second, King of Muscovy and Autocrat of all the Russias. It is said that some of his serfs were emancipated in 1861, and the decree for that purpose was followed by seventeen ordinances much resembling this act of Congress. You are urged to construe the Thirteenth Amendment and the Civil Rights Bill so as to make them consistent with the manifest intention of the American people and their representatives, to follow closely in the footsteps of that enlightened potentate. We are getting along rather fast when the officers of our law can propose to set aside the Constitution that was signed by the sacred right hand of George Washington, and by thirty-nine others, only less illustrious than he was, because it happens to be inconsistent with the decrees of the most ultra despotism in all this world. It is as much a despotism to-day as it ever was. In all those vast dominions, from Cronstadt to Siberia, from the frozen ocean to the German line, there is not a single freeman. Ever since the days of Ivan the Terrible it has been a habit of that despot to change the relative rank of his slaves, just as a Southern planter might have promoted a field-hand to the dining-room or sent his body-servant out to pick cotton. But he never freed a human being. No slave of his dares to express a hope of liberty for himself or his children, except at the risk of his life. No foreigner sojourning in that country is permitted to open his lips on such a subject. The government of Russia is in sympathy with every other despotism, and whenever a tyrant wishes to fasten the shackles more securely on the limbs of his subjects, the colossal power of Russia is ready to give him aid and comfort. You know how effectually this was done upon Hungary. Does the American Attorney-General think that the American courts and juries ought to be abolished because it is the custom in Russia to murder men by military commissions? Will he advise the President that the States should be deprived of their autonomy because the will of the Emperor is absolute law in all his provinces? Does he derive his ideas of reconstruction from the same “enlightened” source? Is the example of Nicholas sufficient authority for a repetition in this country of that brutal outrage which he perpetrated in the capital of Poland—which no Christian man can mention without blushing—but which he followed, while the shrieks of his victims were yet ringing in his ears, with that famous proclamation, “*Order reigns in Warsaw!*” Yes, it is Russian freedom, Russian law, and Russian order that the adversaries of the American Constitution have been proposing to give us.

It is not from the exercise of despotic power, nor yet from the headlong passions of a raging people, that we will learn our duty to one another. When the Prophet Elijah stood on the mountain-side to look for some token of the divine will, he did not see it in the tempest, or the earthquake, or the fire, but he heard it in the "still small voice" which reached his ears after those had passed by. We have had the storm of political debate; we have felt the earthquake shock of civil war; we have seen the fire of legislative persecution. They are passed and gone, and now if we do not hearken to the still small voice which speaks to our consciences in the articulate words of the Constitution from the graves of our fathers, then we are without a guide, without God, and without hope in the world.

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STATE OF MISSOURI *EX REL.* FRANK J. BOWMAN *vs.* E. A. LEWIS *ET AL.*, JUDGES ST. LOUIS COURT OF APPEALS.

IN THE SUPREME COURT OF THE UNITED STATES.

MR. BLACK said: This case involves a point of constitutional law deeply interesting to the whole community, and especially important to the party before you.

It is very plain, very simple, and not doubtful. We may be wrong. If we are, we are so madly wrong that you will decide it against us without hesitation; and if we are right, there can not be much said upon the other side; there is no middle ground upon which you can find a halting-place.

It is my duty to define the present position of the case, and state the ground upon which we expect that you will give to us the right which we vainly asked for in the State court of last resort. We insist upon it that what we asked for was a RIGHT. We demanded an appeal from the decision made against us by the local courts. Other people of the State had that right undeniably; therefore we had it, for the State owed us the *equal protection* of the law.

In view of some assertions and insinuations of the other side, it may be necessary and proper for me to say that the authority of this court is not now invoked by a man of doubtful character, or for a trifling purpose, but that justice may be done to a most meritorious citizen who has been foully wronged. He is a lawyer, and a sentence of expulsion from the bar has been passed against him. Compared to this, an order that he should be taken out and shot would be a visitation of mercy. You will surely admit that, if he is innocent, he ought to be relieved. When I say that he is a gentleman who stands in a position as near the head of the bar in the Western country as any other of his years has ever reached, and that he deserves to stand



there by his talents and his integrity, I say what I do know—that is, I know it as well as any fact of that nature can be known upon human evidence: for it is perfectly impossible that the men of Missouri, who are known and honored throughout this whole country, would have stood by him, and walked with him through the fiery furnace of this persecution, if there had been the least suspicion of moral unsoundness about his professional character. Judge Wagner is associated with us, not to argue the case, but to instruct us about it. We are proud to act under his direction and guidance. He was the chief judicial officer of the State for many years: he has been equally an ornament to the bench and bar: would he sustain this plaintiff in error? would he defend and indorse him if there was any just reason for a doubt about his character? No, he would see him at the bottomless pit before he would speak a word in favor of a corrupt or unfaithful attorney.

But all this, I think, is beside the present purpose. Not now, not here, at another time and in another place it may be very proper to explode the truth upon this organized band of persecutors. Then they will hear some things to be remembered as long as they live. Hunting the tiger is all very well, but when the tiger begins to hunt *them* they will find the sport not so pleasant.

Let me go on with my skeleton statement to show the technical condition of the case. This gentleman was practicing his profession honorably, uprightly, ably, and successfully, surrounded by all those things that should accompany a high career—"honor, love, obedience, troops of friends"—when a complaint was made against him in the Circuit Court of St. Louis for "malpractice, deceit, and misdemeanor." He pleaded not guilty, and demanded a trial by jury. The jury came, and the trial proceeded. It lasted a month, and ended with a verdict of guilty. I need not say that my client alleges the ruling of the court, which drove the jury into this verdict, to be all wrong. He was treated throughout as one who had no rights which a white man was bound to respect. He asked for an appeal to correct those errors. I call them errors, because that is the technical word, and the only word I have a right to use when I am speaking in one court about the conduct of another. I can imagine myself in a place where I might feel justified in using a very different and much stronger term.

The appeal was given; but it took him only into the Court of Appeals for the city of St. Louis—another local court, elected by the same constituent body. There he encountered the same evil influences, and the same bad passions, which had caused his conviction in the Circuit Court. The judges of the Court of Appeals affirmed the judgment of the Circuit Court with great pleasure, and refused him an appeal to the Supreme Court with rapture.

Other persons living and prosecuted in other counties of the State, for precisely the same offense, might appeal to the Supreme Court to get an illegal judgment reversed, and he thought himself entitled to the equal protection of the law. So therefore he went up to Jefferson City and asked the Supreme Court for a *mandamus* commanding the lower court to allow an appeal and send up its record for revision. The judges of the State court of last resort held that an appeal would not lie, and therefore refused the writ of *mandamus*.

Now, think for a moment of the circumstances under which this demand was made and refused. By the statute law of the State, in full force for many years, an attorney might be tried in a civil court, not for contempt of that court, but for misbehavior in another court, or for wrongful acts done in his private office, unconnected with the business of any court. If convicted, he might be punished, not merely by being stricken from the rolls of that court, but by total expulsion from the profession, and disabled to practice in any court. Observe : the proceeding is not instituted for the preservation of discipline in that particular court, but to punish a general crime against the public justice of the country, and this crime may be prosecuted in a court without criminal jurisdiction, without indictment, without a grand jury, without the intervention of any public accuser, but at the instance of private enemies and rivals of the party. A more anomalous law has never been enacted ; a more dangerous instrument of personal malice has never been furnished by the legislation of any country.

I think this law is fundamentally vicious and void all through, because it inflicts the most frightful penalty for the most infamous offense, without the kind of accusation or trial which the Government of a free country owes to every citizen. But while it stripped the accused party of some rights which the meanest offender possesses, it left him one great right which made him at least measurably safe : it gave him the right of appeal to the highest tribunal of the State. It gave original jurisdiction to the local courts, but declared that their judgments might be revised, and, if wrong, reversed by the Supreme Court. The law was a bad one at the best, but it had the merit of being equally bad for all persons in every part of the State.

But in 1875 a change was made in the State Constitution, and among other new provisions was this : that in the city of St. Louis, and three adjoining counties, the right of appeal to the Supreme Court should be taken away, while it should continue to be enjoyed by the inhabitants of all other counties and cities.

The present plaintiff in error suggested that this discrimination was inconsistent with the fourteenth article of the Federal Constitution, which secures to all citizens alike the equal protection of the law. He had the profoundest respect for the judges of the State Supreme Court, and fully believed that if they would take cognizance of



his case they would do him justice. But they were awed by the words of their State Constitution. They could not entertain an appeal without declaring that the State Constitution, which forbade them to do so, was void. This was rather embarrassing. They could hardly be expected to decide against the validity of the Constitution under which they held their commissions. No State court, I believe, has ever done this. They could only declare their inability to see the conflict between the two Constitutions. They acted as Nelson did at the battle of Copenhagen when he was signaled to take his ship out of action : he put his glass to his blind eye, and said he saw no signal of the kind. But these judges did the next best thing : they refused him his right under the Federal Constitution, and put the record in a shape which enabled him to bring his case here and have it decided by the highest authority.

The Supreme Court of the State will be perfectly willing to hear this appeal if you say they are bound to do so, and the plaintiff in error will acquiesce in any decision which it makes, whether it be for him or against him.

The principal question, the question which lies at the bottom of the case, is this : Can an appeal to the Supreme Court of a State ever be claimed as a *right*? Or is it a mere favor, which may be refused without injury?

We think it not only a right, but a right of inestimable value. If it be conceded to one man and refused to another it is mere folly to say that they both enjoy the equal protection of the law.

You and I and all of us know very well that the administration of justice in the local courts is always liable to be seriously disturbed by ignorance, prejudice, personal hostility of the judges, and other like causes. These evils are greatly aggravated by the system of electing judges now adopted in all the States.

My own experience enables me to count up hundreds of cases, in which the grossest injustice would have been done if the decision of the local courts had stood unreversed ; and there are cases ten times as numerous where right was done according to law, only because the judges were conscious of a control by superior authority. The value of the right to appeal is incident more to its existence than its exercise. Would you be willing to live in a city or county or other subdivision of a State in which no writ of error could be taken to correct the wrong which might be done by a local court? Having that right, would you be willing to part with it at any price? You might feel secure in the local courts if you knew the judges to be friendly, or, without their friendship, if you were sure of their honesty, virtue, and learning; but under any circumstances you would feel your sense of security greatly increased by the knowledge that, if wrong was done, you had a remedy in some superior court.

The judges of the Supreme Court may do wrong themselves, for they are fallible like the rest of mankind, but the security given by their jurisdiction arises out of the fact that their relations to the case, and the parties, and to the law which they administer, are totally different from those of the inferior courts; for they must act upon rules which apply to the whole people, and which all parties can stand by. They represent that public wisdom which is universally recognized.

For these reasons, and others equally good and sufficient, every civilized community has provided itself with one supreme tribunal charged with the duty of keeping the rest in order. It is so in France, in Prussia, and in all the German States. If it is not so in Russia and Turkey, it is because in these countries they have no system for the administration of justice. There the law has no *head* because it has no *body* and no *life*. In England, ever since the time of the Saxon Heptarchy, there was a King's Bench whose writs of error ran into every county. In Scotland, as soon as they got rid of the jurisdiction exercised by the chiefs of the clans, they civilized the kingdom by subjecting all the local courts to the revision of one central tribunal. Before the Revolution the decrees of our Colonial courts could be examined and reversed by the Privy Council, to which they were required to send up their records upon appeals properly taken. Every State in the Union is provided with a Supreme Court, and so is every organized Territory. Georgia tried for a while to do without; and got along badly enough. The consequence was so much uncertainty and wrong that she was driven, by stress of sheer necessity, to do what all other States had done, and make her law uniform by means of one controlling court.

What sort of government would this Federal Government have been without the one Supreme Court, required by the Constitution, to correct the errors of inferior Federal courts and reverse the false decisions of State courts on questions of Federal law? Would not every provision be differently construed at different places? What chance would men have of getting their legal rights uniformly and justly administered? It is not too much to say that without this sheet-anchor of our judicial system all the purposes of the Government as expressed in the preamble of the Constitution would be defeated. We would have neither union, justice, tranquillity, common defense, general welfare, or liberty for ourselves or posterity. The right of appeal is the right preservative of all rights; public safety and private security are alike involved in it—life, liberty, property, all depend upon it.

I do most devoutly believe in the right of trial by jury. I think it entitled to all the veneration and respect which is felt for it. It has cost great expense of blood and treasure to get it. Rather than give it up I would pay over again the whole original price. The enactment of the *habeas corpus* law was a strongly marked era in the



history of the great race from which we sprang; and without it no people can be altogether free. But sacred as these privileges are and ought to be, I would surrender them both, rather than lose my right of appeal from false and oppressive judgments of the local courts. Perish the writ of *habeas corpus*, perish the trial by jury, but save me the great privilege of appeal. Armed with this, I can defy the malice of my enemies in the lower courts. Political prejudice, religious bigotry, personal spite, may do their worst if I can have my rights measured at last by "the golden metewand of the law."

I do not deny that an American State may, if a majority so please, abolish the right of *appeal*, *trial by jury*, and *habeas corpus*. A State may make its government as tyrannical as it pleases, provided it does not go to the extent of being unrepugnant; and even then I do not see how you can reform it. But since the Fourteenth Amendment these fundamental rights must be given to all of the people alike; all are entitled, by the Federal Constitution, as well as natural justice, to "the EQUAL protection of the law." The State can not make free institutions for one class while another is held down by oppression. The trial by jury must be given to all or none. The writ of *habeas corpus* can not be confined to one class or one place while others are excluded from the privilege. The people of a hundred and nine counties in Missouri can not make a Supreme Court for their own use, and refuse to share the blessing of an appeal to it with the people of the other four. Why? Because that is manifestly *not* giving to all citizens the equal protection of the law.

It is said that the object of the Fourteenth Amendment was to make the negro equal to the white man. As a historical fact I suppose that is true. But to effect their objects the framers of the amendment were obliged to use words so general that all men are made equal. It is preposterous to say that a provision for the perfect equality of all men can be used only for the benefit of a class—the distinction between classes being the very thing prohibited. I think I can prove that no distinction can be made under this amendment between different classes of white men as easily as I can demonstrate a geometrical problem. Suppose you have two white men and one negro, whose civil right it becomes your duty to measure. You know very well that the negro is exactly equal to either one of the whites, and they are both equal to him. You can, therefore, make no difference between the negro and the white men, and therefore you can not distinguish between the white men themselves, because things that are equal to the same are equal to one another. Is not that as certain as mathematics?

If a State Constitution would provide for a Supreme Court, to which none but white men should appeal, compelling all negroes to suffer whatever wrong might be inflicted by the local courts, no man

would insult you by asserting in your presence that the negro and the white man were equally protected. If the negroes got possession of a State government and would exclude all white men from the right of appeal, would not that be just as bad? The color-line is not a worse division than another line which might be run across it at right angles; that is to say, a division of the people into two classes without regard to race. Suppose, for example, that the right of appeal be given only to persons of a certain religion, or certain political principle, would you stand that? Certainly not; and your answer in the negative would not depend in any degree upon the color of the persons affected. Many absurd distinctions might be imagined. But the most senseless and unreasoning that ever was invented is a distinction based on local habitation. People who live in the mountain ranges of the State shall have an appeal; but those who cultivate the alluvial lands of the valleys shall have none. Writs of error shall run into the wheat-producing counties; but in the cotton-growing regions all men shall be at the mercy of the local magistrate. In the rural districts the courts of original jurisdiction shall administer justice according to the law of the State as expounded by the Supreme Court; but in large cities, where law is needed much more, vice and wickedness may riot unchecked.

If you can excise four counties from the rest of the State, and put them out of the pale, you can make smaller subdivisions for the same purpose; you can disfranchise the people of a township, for instance. Suppose your State Constitution declared that a ward in St. Louis shall elect its own magistrates, to be called judges, justices, aldermen, lynch courts, regulators, or vigilance committees—what you will—but they shall have unlimited jurisdiction, and decide all causes without appeal or writ of error—what sort of a ward would it be? Another Alsatia, filled with dangerous criminals, among whom no honest man could show his face with safety. And why would honest men be unsafe in such a place? Because there the inhabitants have not the equal protection of the law. Wanting the right of appeal from the local courts, they are destitute of everything that can be called a legal right, or, what is the same thing, without adequate remedy for any wrong.

MR. JUSTICE STRONG.—I wish to ask, Mr. Black, if a writ of error or appeal can ever, in any case, take up a judgment from the St. Louis Court of Appeals to the Supreme Court of the State; or are the decrees of the St. Louis Court of Appeals always final by their present Constitution?

MR. BLACK.—No, not always. In some cases, or classes of cases, the St. Louis Court of Appeals is merely intermediate.

SENATOR EDMUNDS.—The St. Louis Court of Appeals is, by its structure and jurisdiction, an *inferior* court.



[The Senator handed to Mr. Black the Constitution of the State, from which Mr. Black read the section which created the St. Louis Court of Appeals, and defined its powers.]

MR. JUSTICE STRONG.—I asked for information, not knowing the state of the facts. Something might depend upon the question I put. If the Constitution established two separate and independent Supreme Courts for different parts of the State, dividing the territory, for instance, by the Missouri River, perhaps it could not be said that the people north of the river were not as well protected as those on the south.

MR. BLACK.—Perhaps not. The protection of both would be equally bad. Of two appellate courts, equal in authority, and both exercising final jurisdiction within their respective territorial limits, it could not be said that either was supreme. They would be local courts, with unlimited power, like those which Georgia suffered under, and only a little better by being two instead of five. But this is mere speculation. In fact, and in truth, this St. Louis Court of Appeals is local, and inferior in its origin, object, and purpose; in its nature and character; in the mode of appointing its judges; in the source of their compensation, for they are paid as well as elected by the excised counties, and not by the State; it is local by its very name. It is not made, and can not be expected, to administer the law of the land—the *lex terræ*—which prevails elsewhere in the State. That it hears causes by way of appeal, does not make it less dangerous to the rights of citizens than it would be if it had only original jurisdiction. Two local courts are not a whit better than one. If I want the laws of the State applied to my case, it is mere mockery to tell me that one judge of a city court is more likely to give it to me than another, both being under the same influences, and responsible to the same constituent body.

If your honors will say that my client in this case shall have an appeal to the Supreme Court of the State, and thus get the equal protection of the law as there expounded, you will interpret the Fourteenth Amendment beneficently, according to its letter and spirit. And the judgment in this case will be consonant to all your past decisions on this subject, as those decisions are now universally understood.

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## THE MCGARRAHAN CLAIM.

BEFORE SENATE COMMITTEE ON PUBLIC LANDS.

*Senators:* The patience with which you have examined the details of this case, and listened to the minute criticism of counsel upon every part of it, assures me that you will give your attention to the more general views of the subject which I have to present. Hear me for my cause; believe me for the sake of justice, and have respect unto the testimony, that you may know the truth.

What is it that the claimants desire Congress to do for them? The memorial sets forth as a fact that on the 14th day of March, 1863, a patent was regularly issued, signed by the President, sealed, recorded in the General Land-Office, and in all respects completely executed, except that it was not countersigned by the Recorder; that on this instrument the patentee brought suit and failed to recover, solely by reason of the Recorder's failure to sign it; that this defect being merely clerical, he prays you to give him the remedy of a statute which will either compel the Recorder to affix his signature *nunc pro tunc*, or else declare the patent to be good without it. There is a prayer also for general relief.

I admit that if he was then entitled to a patent and he got a defective one, it ought to be amended; if the patent was improperly refused to him a new one ought now to be issued, and the Land-Office is bound to do this without legislative compulsion. If we assume that Gomez was the honest and true owner of the land—that his claim had been heard and finally determined in his favor by the proper judicial authorities, and that a regular patent would have been but a due execution of the decree in his favor—*then* we can make no objection to anything which will secure him or his assignees in their just rights. The arbitrary refusal of a ministerial officer to execute the judgment of the court can not deprive the claimant of property which the judgment proves to be his.

But you know from the conclusive evidence of the records that he had no decree in his favor; there was a decree against him, and therefore he had no more title to the land in question than he had to this Capitol. His claim was fraudulent and void. That is a fixed fact, immovably established by the solemn judgment of the Supreme Court. The final decree, made by the tribunal of last resort, nullified all previous patents, and made it impossible for any subsequent patent to be lawfully issued. The question, therefore, whether a patent was made out and signed in 1863 or not, has no importance whatever in its bearing upon the legal rights of these parties. Whether signed or unsigned, it was equally worthless.

The treaty of Guadalupe Hidalgo transferred the public domain in California to the United States, coupled with a stipulation for the



protection of all private titles lawfully made by Mexico, previous to the conquest. After the war many titles to the most valuable lands in the country were set up. Some of them were true, and many were false. To carry out the terms of the treaty in good faith, and at the same time protect American settlers, Congress provided for a Commission to ascertain, settle, and determine what claims were false, and what were true. Any person having a Mexican claim to land might come before the Commission and show his title—that is to say, institute a suit against the United States for the confirmation of his claim. Either party (the claimant or the Government) might appeal from the decision of the Land Commission to the District Court, and from the District to the Supreme Court. It is manifest that this raised a purely judicial question. Beyond all doubt the legal and equitable rights of the parties depend solely upon the determination of the court in which the suit is instituted, or to which it is taken by appeal. The final decree is as a plea on estoppel, and as evidence conclusive upon the parties to the record, and upon all persons claiming by, through, or under them.

After a claim has been confirmed by the court of last resort, or after it is confirmed by one of the inferior courts, and the United States acquiesces in the decree, on the ground that the claimant's title is good and ought not to be further contested, a survey may be made and patent issued. But a survey or patent is wholly illegal, and therefore wholly void, if made or issued pending the proceedings for confirmation, or after the final rejection of the claim. The law which authorizes a survey and patent expressly confines the power to cases of finally confirmed claims. Knowingly and willfully to issue a patent pending the proceedings to confirm it, or after the rejection of it, is certainly a criminal misdemeanor, for which the officers who commit it might be indicted and impeached.

If you find yourselves troubled with doubts on this subject, your minds will be settled by looking at the opinion of Chief-Justice Taney in *United States vs. Pacheco* (20 Howard, 261). But the point is too clear on principle to need the support of authority. It can not be that a patent professing to be founded on, and authorized by, a judicial decree is valid if inconsistent with the decree.

The patent and the survey are ministerial acts. They are not judgment, but execution. Like all executions, they must follow the judgment and conform to it strictly. They must include no land, except that which the decree awards to the claimant. No plaintiff in a common law action of debt has ever thought that he could take out a *fiery facias* before he got judgment, or make a levy after judgment for the defendant. Yet he might do so as legally as this claimant could get a patent upon his rejected claim.

Gomez brought suit against the Government for a certain tract of



land which he averred had been granted to him by the Mexican Government. The Land Commission rejected his claim, and he appealed to the District Court. There he got a decree of confirmation, from which the United States appealed to the Supreme Court. In the Supreme Court the claim was rejected. He says now that while the question of title was *sub judice*, and before its final rejection, he got a patent from the Land-Office. What if he did? The patent was void. It was in direct conflict with the decree. It had no more force than a blank piece of parchment. What is the use of inquiring whether a paper was formally executed or not, when, in either case, it is equally good for nothing?

I do not admit that a patent was ever made. I only concede the allegation to be true for the purposes of the argument. I insist upon it that, patent or no patent, our rights and those of the claimant were exclusively settled in the courts.

Perhaps the suggestion of the memorialist, that he failed in his last suit solely because the patent was not countersigned by the Recorder, is entitled to some explanation. The action referred to was ejectment brought by McGarrahan against the New Idria Company. At the trial the plaintiff showed what he calls the record of his patent, and the defendants, relying less on their own strength than on the weakness of their adversary's case, did not produce the record of the final decree, or any other proof of title in themselves. Practically, the case went to the court on a demurrer to the plaintiff's evidence, and the question of law raised was whether the patent or the record thereof as exhibited did *proprio vigore* vest any title in the plaintiff. This question divided itself into many points, which were elaborately debated. The State court decided it against the plaintiff, for the reason that the patent appears on its face, and by its own recitals, to have been issued pending an appeal in the proceeding for confirmation. The plaintiff took a writ of error to the Supreme Court of the United States, where the judgment was affirmed for a different reason, namely, that the draft of a patent is nothing without the signature of the Recorder, which this one did not pretend to have. In the State court the patent was held to be void; in the Federal court it was decided to be no patent at all. The two courts began the consideration of the case at different ends of the subject-matter, and each at the first step found a defect in the paper relied on so fatal that it was unnecessary to go further.

How would this justify an act of Congress to make them a patent now? If they got one that was void, because it was based on a fraudulent grant, will you take it up and give them another which must be equally void for the same reason? If they got none, will you pay a premium on their failure by making it falsely appear to have been a success? Remember, you are asked to give them a title for land



which they and you and all of us know to be the property of other persons. The decree of the Supreme Court settled that, and you can not unsettle it, or rejudge the justice that was done there. Our right, resting on that solid foundation, can not be moved by the united strength of forty thousand patents, signed by as many Recorders.

At the same time the same court, and that the highest in the nation, adjudged the title now urged against us to be fraudulent and void. That destroyed the case past all hope of revival. McGarrahan himself admits, in one of his letters, that it was killed in the Supreme Court. It was not only put to death; it was condemned to be hung in chains; it was gibbeted in the face of the world as a wretched fraud. There is no power in this country that can take it down.

When I implore you not to interfere with our rights thus legally acquired, I am asking only that you observe a rule of property regarded as sacred by every civilized Government, and absolutely necessary to the security of all the people. An act of Congress to take this land from the owners, who hold it under the United States, and give it to others who have no claim, except what is based on an adjudicated fraud, would be an outrage upon private rights so shocking and so shameful that it is not to be thought of for a moment. No act of Congress, having such a wrong for its ultimate object, can ever be carried into effect until the Constitution is wiped out, and the courts cease to perform their functions.

But, though we are legally safe against any attempt to legislate us out of our property, it would cost us much inconvenience to defend our rights against such an adversary as ours, if armed with even an unconstitutional act of Congress. The slightest encouragement from you would impel him to another series of suits. This would indeed be vanity, but it would also be great vexation of spirit.

Mr. R. P. Hammond, specially appointed for that purpose, went to the ground, and ascertained how it was occupied. He has reported officially that many persons, besides the New Idria Company and its employes, are settled within the limits of the claim as now defined. Their holdings have probably but little value, except what their own improvements have given to them. They have no representative here; their poverty makes them defenseless. In the name of all these persons, and for the sake of others in like condition, I beg you to speak with solemn emphasis, when you assure them that you can not and will not subject their homes to the sack and pillage of these fraudulent claimants.

Thus far I have spoken only of the legal relations existing between the claimants and the alienees of the United States. I deny your power to take away the land to which private parties have acquired rights from the Government. But so far as respects that portion which up to the present time remains unsold and unoccupied,

it is public property, and you can dispose of it as you please. You may bestow it on these claimants as a gratuity, if you think they deserve it.

But they do not deserve it. We protest against a legislative grant even though it may not affect, or be intended to affect, any individual rights. Perhaps the Supreme Legislature of the nation has power to gratify the rapacity of these people by robbing the Government of its lands not already disposed of to others, but such an act is forbidden by moral considerations which ought to be as strong as any constitutional interdict.

Who are these claimants, and what are the merits on which they base a demand for the special intervention of Congress in their behalf? We shall see.

The original claimant was Vicente P. Gomez. He first set up a title in himself as the immediate grantee of the Mexican Government. In his name the proceeding to confirm it was instituted and carried on through all its stages. But at a very early period he made a deed conveying an undivided half to Pacificus Ord. Gomez and Ord were then equal partners, and so continued until Gomez sold his remaining interest to McGarrahan. Since that time Ord and McGarrahan have prosecuted the claim for their joint benefit, the latter being more active, but always recognizing Ord's right, and holding him responsible for half the expenses. McGarrahan himself swore in your presence that Ord never released his share, and that he had acted for him under a power of attorney. Whatever they get out of the claim by the present proceeding, or any other, must enure jointly to Ord and him both. They are hunting in couples, and the prey they pull down must be divided between them.

Now we assert that neither Gomez, nor the firm of Gomez and Ord, nor the firm of Ord and McGarrahan, nor any member of these partnerships, ever did or suffered anything which entitles them to legislation of any kind for their relief.

I will give the story of their wrongs as strongly as they themselves have ever recited them, condensing their voluminous arguments, petitions, and letters into as few words as possible, and leaving out the coarse and violent language in which they have clothed their complaint.

Gomez, they say, had a good Mexican title to the property in question. In the integrity of his heart he petitioned the Land Commission to confirm it, and, failing there, he appealed by his proper attorney to the District Court, where it was legally confirmed. This just decree, thus righteously obtained, ought to have stood unmoved as a final adjudication between him and the Government; but it was not permitted to remain undisturbed. On the contrary, the judge declared that he had been imposed upon, struck it from the record as a



fraudulent nullity, and gave notice to the claimant that he must show his title before it could be confirmed. This judge died, and was succeeded by another more upright judge, who reinstated the decree of confirmation. The enemies of the claimant then went the extreme length of appealing to the Supreme Court. The Supreme Court wickedly sustained the appeal in the face of the claimant's protestations. The judges forced him to face the proofs, heard the cause, and after full debate unanimously decided his claim to be fraudulent and void. This decision was false. The judges were corrupt, and their opinions in the case were full of lies.

Such are the grievances he suffered at the hands of a dishonest judiciary. But by his account the Executive Departments were harder on him still. When his title was laid before the Attorney-General it was so perfect, and accompanied by proofs which showed its genuineness so clearly, that all opposition to it should have been instantly withdrawn. But that officer refused to perform his obvious duty. Instead of aiding the claimant to get justice, he commenced a system of malignant persecution against him. The Attorney-General's office, through several administrations and under many heads, so far from admitting the known truth, that this was an honest claim, denounced it as an impudent fraud. Not only was the machinery of the office used to defeat it, but the heads of the office made common cause with the alienees of the United States, and accepted the aid of their counsel in the wicked work. They insisted upon taking the case into the Supreme Court, where the claimant was utterly unwilling to go. They argued it there, and furnished the facts and reasons which the judges used in their lying opinions as an excuse for their corrupt decrees.

But worse than all this was the conduct of the Interior Department. The claimant was fairly entitled to a patent. He was not bound to await the determination of the courts. It was the duty of the Land-Office to let him have it at once. He did get it fairly, honestly, and without any kind of misrepresentation, false token, trick, or device. The patent was made out, signed, sealed, executed, and recorded. It was a perfect muniment of his title. But it was withheld from him, and a subsequent Secretary had the hardihood to tell him it had never been signed. Upon examining the paper it was found to have been mutilated by detaching the two last pages on which the signatures were, and substituting two other pages without signatures. In other words, the claimant was the victim of an infamous forgery.

The history of the claimant's grievances has been made up so plausibly, persisted in so long, and repeated so often, that some good but credulous men in Congress and elsewhere have believed it to be true. Acting upon their faith, they have joined in the demand for reparation. They have given all their sympathies to the injured par-

ties, and their wrath has waxed hot against the oppressors who have "held them so under fortune." If you believe it you can not be blamed for proposing some compensation to the sufferers out of the public lands or the public moneys.

But their whole story, through and through, is transparently false—false in the beginning, middle, and end—false in the aggregate, and false in every part. It is not a mixture of fact and falsehood—truth dashed and adulterated with lies—it is purely false : made out of the whole cloth without one particle of honest material in it.

The fundamental fact that Gomez had a grant is a mere fabrication. The allegation is not only unsupported by any legal, sufficient, or satisfactory evidence, but it is contradicted by overwhelming proofs. The pretense of a grant lies at the foundation of their case, and that being swept away, everything built on it must go to ruin along with it.

I will not repeat to you now, in detail, the reasons for believing the claim to be a false one. I have given them often already, and they are on record. You will find them set forth in the opinions of the Supreme Court. Several of my colleagues have gone over them in their arguments here. Even if they were not pointed out at all, you would readily perceive them from the record. It does not require any analysis of the evidence to show that it is all on one side. No unprejudiced man of average sense was ever taken in by it. No judge and no public officer that looked at it has ever expressed a doubt of its character.

There were very many of these fraudulent land claims set up against the United States and their assignees. After the close of the war with Mexico, the discovery of gold, and the rush of emigration to California, the fabrication of Mexican titles for lands became a trade and a business, in which such men as Gomez, Abrego, and Moreno engaged with great assiduity. It seemed at one time as if the whole public domain, with all the improvements made by the settlers, would become the prey of these spoilers. Every growing city, every town of importance, the richest agricultural districts, the most promising mines, all the sites necessary to guard or light the coast, were covered with these pretended grants ; and professional witnesses stood ready to swear that they were genuine. The duty of the public officers to resist them was arduous but imperative, exacting severe labor and untiring vigilance.

The claim of Gomez, just as he made it out and presented it to the Land Commission, had less to commend it than any other. Of all the frauds that came up, this was the plainest and easiest to expose. Either as Attorney-General or as private counsel, I became familiar with all these false claims, and I know whereof I affirm, when I say that this one had less claim to respect than any other. If you doubt



this, take the rejected cases (they are all reported), and make the comparison yourselves. You will find that not one among them was better entitled to the steadfast opposition which I gave it, or the brand it got from Mr. Bates when he denounced it "a naked, impudent, and very clumsy fraud"; and nothing ever was more just than the unanimous and stern condemnation it received from the court.

Did the claimants, Gomez, Ord, and McGarrahan, know it to be false? Something depends on the answer you may give to this question. The faith of the claimant could not save the claim. But the moral aspects of the present case will be materially different if you find that, while these men were trying to get the claim allowed, they were perfectly conscious of its fraudulent nature. That makes them guilty of a high criminal offense, defined and punished by the act of 18th May, 1858. (Revised Statutes, sec. 2471.) The penalty is imprisonment at hard labor, not less than three, nor more than ten years, and a fine not exceeding ten thousand dollars. Have they brought themselves within the provisions of this statute? If yes, then the Government is not only not in debt to them, but, *per contra*, they each of them owe the Government at least three years of service at hard work in the penitentiary. The account is heavily against them on this score alone, to say nothing of others.

Gomez did most certainly know that he never had a grant. If he had one, he made it himself, and did not show it for fear of detection. It is curious to note how cautious he was about swearing on this point. His own oath, showing the existence and loss of the paper, and his consequent inability to produce it, was necessary to legalize parole evidence of its contents. But he would not lay this foundation. He left the case on the inadmissible testimony of his professional witnesses.

After he had divested himself of his whole interest by his conveyances to Ord and McGarrahan, he was a perfectly competent witness, yet he did not testify. He made several *ex parte* affidavits on incidental matters, but he never would assert the genuineness of the grant. He was ready with his pen in the fabrication of title-papers, and handy with his oath in swearing them through; but he could not always make them fit. He had been caught several times before, and he had learned to be careful.

Who was it that clandestinely placed the bogus petition *informe* and *deseno* among the Mexican land papers of the Surveyor-General's office? That they were not truly a part of the records is perfectly certain. That Gomez secretly put them there is equally clear. They were altered by Gomez while the case was pending before the Land Commission. At the institution of the suit, he laid before the Commission a *deseno* which he said he had borrowed from the office and



was part of his *expediente* on file among the archives. Afterward the papers were produced, and behold ! the *deseno* was totally different. This last one was traced back to its origin, and identified as an old map of another tract two hundred miles distant, but which had been thrown aside. You will look at the sworn statement of Mr. Hopkins, keeper of the archives, and if the facts there do not compel you to believe that this unfinished *expediente* was a fraud and a fabrication, perpetrated by Gomez himself, there is an end of all reasoning on circumstantial evidence.

Did Gomez communicate his guilty knowledge to Ord ? Upon that question we have no direct evidence, but there can be no reasonable doubt that in the beginning there was a plain bargain between these two men. Gomez was to get up the false title, and Ord was to get it confirmed by betraying his trust to the United States. The risk, the labor, and the moral atrocity being about equal, the fruits of the enterprise were to be equally divided between them.

Gomez could not have concealed the actual character of this claim from Ord if he had tried. Ord was a lawyer who knew the rules of evidence and had some experience in the examination of these Mexican titles. This thing could not impose upon him for a moment. His consciousness that it was not only false, but nakedly and palpably false, was betrayed at every step he took.

After the claim was rejected by the Land Commission it became necessary to appeal. Ord, the District Attorney, took the appeal himself against the Government which he professed to represent ; but he did it in the name of other attorneys, who were not concerned in the cause, and knew nothing about it. His petition for review, with the names of Sloan and Hartman appended to it, was a manifest forgery. Then he got Mr. Hartman to move the reversal of the Land Commissioners' decree, and a substitution in its place of a decree confirming the claim. Then Mr. Ord came forward, and in the name of the United States, whose official representative he was in that court, declared that the Government had no objection to the confirmation. Thus, by a series of criminal manœuvres, he became *dominus lites* on both sides, and got a decree in his own favor against the public, who was his own client, in a case plainly fraudulent, without subjecting it to the scrutiny of any lawyer or any judge.

This was, beyond all comparison, the worst offense ever committed in this country against the administration of public justice. The decree so obtained was a mere nullity. I mention it now, however, to show that Ord, as well as Gomez, knew the original title to be false. If he had had the least faith in the genuineness of his papers, or the credibility of his professional witnesses, would he have resorted to such deception, falsehood, and forgery to prevent them from being examined ? Is it morally possible that he would run such heavy risks to



cover up and conceal from court and bar the merits of a claim which he believed to be honest?

But McGarrahan abjures all connection with the fabrication of the title or with the imposture practiced by Ord upon the court. He alleges that he bought into the business after these frauds were committed, and being an ignorant as well as an innocent purchaser, it is a hardship upon him to lose his investment, small though it was. He states here upon oath that he bought upon a "certified transcript under the seal of the court," by which he means that he took the title in good faith, believing it to be sound because it appeared by the record to have been regularly confirmed by the District Court.

This account of his original connection with the case was given when he first appeared in the contest, and it has been adhered to ever since. If it were true it would not make his right in law or equity one whit better. The actual owners of the property are not to be plundered by means of a fabricated and false title, no matter in whose hands it may be, nor how it came there. McGarrahan could take nothing but the title of Gomez, with all its imperfections on its head.

But I do not pause to discuss the principle. I deny the fact. There is not one word of truth in the allegation that he bought ignorantly. The record flatly contradicts the whole story, and shows that at the time of his purchase there was no decree in the case except the decree of the Land Commission *rejecting the claim*. A glance at the dates will show you this. The deed from Gomez to McGarrahan was made on the 22d of December, 1857. The decree which Ord got, reversing that of the Land Commission, and substituting in its place another confirming the title for three leagues, was made and put on record—when? On the 7th of January, 1858. This was abandoned (or perhaps I should say enlarged), and another confirmation entered for four leagues on the 5th of February, 1858. Can anything be more absurdly false than the allegation that he bought it in December on the faith of the approving decree, which was not made until the following January?

When he bought he may have had a certified copy of the record as far as it existed at that time. If he had it gave him distinct notice that he was buying a worthless title, rejected by the tribunal having jurisdiction to decide upon its validity. It was a dead claim then, and he certainly would not buy it in that condition unless he saw some hope of reviving it by getting a confirmation on appeal. No such hope could be inspired by an examination of the title itself. If he looked into the papers and proofs he must have seen that no judge could respect them as truthful and genuine.

He may also have known (and he did know, for the record on the 5th of June, 1857, discloses it) that Ord *intended* to get the decree of the Land Commission reversed, and a decree of confirmation by the

District Court. But he also knew the facts which would make any such decree a mere nullity. He knew that Ord was attorney on both sides, and that there was an agreement between Ord and Gomez for Ord's corrupt services in getting the confirmation. This agreement was referred to in his deed, and he held his right subject to it. In other words, he made a covenant, running with the land, that Ord should receive the wages of his iniquity according to the measure agreed upon by Gomez. It is as plain as day that McGarrahan paid his money, not for the worthless title rejected, condemned and killed by the Land Commission, but for Ord's promise to betray the United States, and trick the court into a confirmation.

McGarrahan having stepped into the shoes of Gomez, he held Ord to his engagement, and held him hard. Within sixteen days after he came into the case, Ord consummated his imposture upon the court. A decree drawn up by the District Attorney, under the pay of the claimant, was adopted by the judge, and formally entered of record, confirming a title which stood no earthly chance of being approved on a fair hearing.

This was McGarrahan's own fraud, practiced for him by his recognized agent, attorney, and partner, in pursuance of an agreement to which he had made himself a party, and for a compensation which he had covenanted to pay. As soon as it was finished, he claimed it for his own, and stood upon it with both feet, as the only foundation of what he calls his equity. His every struggle, through the whole judicial contest, was to hold that false and void decree in the place where he put it. All his brutal abuse of public officers, of courts, and of counsel opposed to him, has been provoked by their efforts to set it aside, or to reverse it.

How vain it is to call this man an innocent purchaser, or to excuse him for his subsequent crimes by supposing that he was deluded into the first one? He was not deluded. He made love to the filthy business, and went to it with his eyes wide open.

His later acts all show the animus with which he began. He and Ord have ever since been trying to maintain their position by means as dishonest as those which they used at the beginning.

Mr. Stanton, being then in California, and hearing of this decree, took it upon himself to move that it be opened. It was afterward stricken from the record by Judge Ogier, upon satisfactory proof that it had been obtained by willful misrepresentation. This was most violently opposed, and staved off for a long time on one pretense and another. Why was this opposition? It could only mean that the claimants were afraid of a hearing. If they believed that their title would bear examination, they would gladly have submitted it to the test.

Judge Ogier died, and Judge Haight was appointed in his place.



The new judge, instead of hearing the case, and deciding it upon its merits, as his predecessor had resolved that it should be, declined to give the United States any hearing at all, but reinstated the fraudulent decree as good and valid. He expressly declared the decree to be a base fraud—he had no doubt of that—but the court could not strike a fraud from the record after the end of the term at which it was committed. However, he said, the United States have an appeal, and the Supreme Court will do justice. An appeal was taken, and duly allowed. Then he came back with a sharp turn, and, at the instance of the claimants, he revoked his order allowing the appeal. When the United States, denying his jurisdiction to decide this question, demanded a transcript to be used in the Appellate Court, he forbade the clerk to make one, or to let it be made by the District Attorney.

To a Senator, or to anybody else who has read even the horn-books of the law, I need not say that this conduct of Judge Haight was a violation of his duty. When it is considered that all these preposterous rulings were made in the interest of what the judge himself admits to be a gross fraud, and to prevent the United States from getting an honest trial, either below or above, it becomes difficult to excuse them. The charity that thinketh no evil can scarcely believe that so many palpable blunders could be made in one case unless the judge was under some evil influence. If McGarrahan's explanation came from a credible source it might be a solution of the mystery. He says in a letter that Judge Haight was plowed with before his appointment; that in fact he got his commission with the understanding that he would decide for the claimants. But McGarrahan's mendacity takes all value from his statements except as they are confessions of his own guilt.

With much tribulation the United States got a copy of the record in separate pieces, which being put together, the District Attorney certified them under the act of Congress, and the cause came up in spite of all efforts to prevent it.

Before I go further on this line it is necessary to revert to some other means which the claimants adopted of propping up their false decree.

Very soon after Mr. Stanton's motion was filed to open Ord's decree, and while it was pending undetermined, McGarrahan required a copy of the record, which was made out truly and sent to him. But this true copy did not suit his purpose, because it showed that *no* appeal had been taken, and it *did* include Stanton's motion. He sent it back, and directed that another should be made, regardless of expense; suggesting that the motion should be omitted and an appeal be inserted. This was done, the alteration was made, and so McGarrahan became possessed of a transcript conveniently false. I say it was false because the omitted motion is known to have been on the record long

before, and, in fact, copied as a part of it in the first transcript. That no appeal had been taken or allowed is clearly shown by the original record. Judge Ogier declared judicially that no appeal had ever been granted by him; the clerk himself deposed that no appeal was found; and the Supreme Court, after an elaborate examination of the subject, held, as matter of fact, that the contrary allegation of McGarrahan was untrue.

This false transcript was brought up to the Attorney-General, coupled with a request that he dismiss the appeal. That officer, seeing that an appeal was certified on the transcript, and not suspecting its verity, examined the title. Finding it wholly defective he refused to let it pass as good.

Failing there the claimant took his transcript to the Supreme Court, where the rule gave him a right to docket and dismiss for want of prosecution in time. The court, like the Attorney-General, was unsuspicious of any deception, and the trick upon it was temporarily successful. An order was made to dismiss the appeal, and a mandate issued to proceed as upon a final decree, "the said appeal notwithstanding."

When this order was brought to the court below, the judge said he had never granted an appeal in the case. On the contrary, a motion was pending to strike out the decree, and give the United States a hearing before himself. The claimant applied for a mandamus to enforce the mandate, and the Attorney-General moved to revoke it. The Supreme Court, after argument on both sides, held that the decree of confirmation was obtained by a false contrivance; that there never had been an appeal from it, as McGarrahan's transcript falsely certified; and that, therefore, the mandate ought to be revoked. If you want a verification of these statements, or a fuller detail of them, I refer you to Judge Wayne's opinion, which you can not read without being convinced that the two claimants, McGarrahan and Ord, are as sorry a brace of knaves as one fraud ever yoked together since the world began. (*United States vs. Gomez*, 23 Howard, 326.)

To hold up the decree, and cover the rottenness of their title, the claimants demanded another writ of mandamus to compel the court below to stop the investigation of its character, or open it for a hearing which might let in the light. And yet another mandamus they asked for against the Surveyor-General, to make a survey at once without waiting for the further proceedings of the court. These movements failed, of course, and I only mention them now to show the desperate strategy to which the claimants were driven by their fear of a fair trial.

McGarrahan, with a power of attorney from Ord, organized the Panoche Grande Company, with a capital of five millions (afterward increased to ten), every cent of it consisting in land to which he had



not a shadow of title, and which was not intrinsically worth the twentieth part of the price he put upon it. With the stock of this company, divided into convenient shares, he rewarded his blowers and strikers, and by selling it to ignorant dupes he raised enough money to keep himself personally equipped for the contest.

The whole struggle at that time was an effort on one side to get an impartial hearing, and on the other to hide the original title away under the decree already obtained. The claimants succeeded in the District Court, and for a long time, and by many devices, they prevented the United States from getting a transcript of the record. When at last the Supreme Court got possession of the case, the claimants, instead of coming up to vindicate the title, assaulted the appeal with complaints of irregularity, and denied the jurisdiction of the court to determine the merits, or even to look at them.

When you reflect that the taking of this appeal is charged as a grave offense—that all public officers and private counsel who had anything to do with it are bitterly maligned for their respective shares in it—and that the judges themselves are abused for sustaining it, you will feel bound to look somewhat narrowly into the reasons *pro* and *con*.

Why was it improper to take this appeal? No man with sense enough to know his right hand from his left will say that an appeal from one court to another is *necessarily* wrong. That the Attorney-General and the counsel who were aiding him did a disreputable thing when they brought up from the District Court a decree which they believed to be erroneous, with the object of having it reviewed and reversed by the proper appellate tribunal, is a proposition which no human being will make in the abstract. On the contrary, all men will acknowledge that it was their plain and unavoidable duty. But the integrity of this appeal is impugned on the score of irregularity in manner and time.

Those objections were urged before the Supreme Court on a motion to dismiss, repeatedly argued by the ablest counsel in the country. You will find them fully set forth in 1 Wallace, 694, and in 3 Wallace, 758. If you will read our answer, imperfectly given on page 698 (1 Wallace), and follow that by a glance at the two opinions of the court, you will find it impossible to doubt the perfect propriety of the judgment which sustained the appeal.

But to save you trouble I will here give the objections and the reasons upon which they were overruled, in a form as compact as possible.

1. *Five years had run out between the decree and the appeal.* The record showed this to be untrue, as anybody might see who had arithmetic enough to count his own fingers.

2. *The Judge had revoked his allowance of the appeal.* True: but the Judge had no power to do this. The appeal being once allowed, all jurisdiction passed into the Appellate Court.

3. *There was no citation.* A citation was not needed, the appeal being taken within the term at which the decree was reinstated, and upon notice to the appellee that an appeal was intended.

4. *The record was not filed in good time according to the rule.* But the delay was intentionally caused and contrived by the unlawful acts of the claimants themselves, and the improper doings of the clerk and the Judge, under the instigation of the claimants.

5. *The transcript of the record was incomplete, and not certified properly.* It was certified according to the act of Congress, and if anything was omitted they could suggest diminution, and take a *certiorari* to bring up what was wanting.

What could the court do but sustain the appeal? It was a strictly legal exercise by the United States of a clear right. It was properly used as the only means left to get the justice which had been sold away and denied in the court below. The claimants' real objection was that if it was heard on its merits it must necessarily result in their defeat.

When the case was reached for argument fresh counsel appeared, and insisted upon being heard anew upon the motion to dismiss, and they were fully heard again. They did not change the opinion of the court, nor shake the faith of a single judge in the right of the United States to get a fair hearing on the merits.

I do not speak merely from memory, but from the report as well, when I say that their argument on the title was a confession of its invalidity. They could not stand up and say on their professional responsibility that they believed Gomez ever had a grant, or that the confirmation obtained by Ord was not fraudulent. But they appeared for McGarrahan and told his story (an old story even then), that he was an innocent purchaser without notice of the fraud. Therefore the false title of Gomez should be pronounced good, and the fraudulent decree of Ord should be permitted to stand. This proposition was untrue in point of fact, and totally unsound in law. The court decided the issue before it, which was whether Gomez had a title or not. And of course it was decided according to the law and the evidence. The claim was rejected as a mere fraud, unsupported by any decent show of evidence in its favor.

But suppose the claimant to have been honest, the papers genuine, and the confirmation just: that would give him no right to the land which he is now seeking to get. What he is grasping at here is not what he clamored for in the courts, but a totally different thing. Of all his false pretenses the most impudent is that which changes the location of his claim from the place where he put it in his judicial prosecution of it to another and far distant region of the country.

In the petition of Gomez to the Departmental Governor; in his petition to the Land Commissioners for confirmation; in the decree of



confirmation itself, as manipulated by Ord; in the conveyances made by Gomez to Ord and McGarrahan—the land is described as lying and being at a certain place, well defined by boundaries given with more than common precision. Those boundaries are the lines of two ranchos on the north and south, which belonged respectively to Don Juan Ursua and Don Francisco Arias, and on the other sides certain hills and plains are given as limits. By the *deseno* with which he accompanies his petition to the Commissioners, he shows exactly the local relation of the land he claimed with the two ranchos mentioned. He exhibits his tract as lying between those of Arias and Ursua, and abutting directly upon both. That was the land claimed by Gomez, by Ord, and by McGarrahan, all through the judicial proceeding. But the tract that Gomez professed to want, “for the interesting business of agriculture,” did not answer the purpose of McGarrahan. He had cast his covetous eyes on a mine in the mountains, twenty-four miles away from the Gomez ranch, and he unblushingly moved the claim over to take it in.

I have not stated this point with any intent to discuss it. That has been done already. The argument of Mr. Evarts before the House committee of 1870 is strikingly clear. Mr. Burdett has eviscerated the documents and analyzed the evidence on this part of the case with unequalled power, and has held it up in so strong a light that no further exposure is needed. The official map of the country is itself an ocular demonstration, and, taken in connection with the depositions of the Surveyor-General, and other witnesses who describe the topography of the ground, it puts an end to all controversy. There you see where the two ranchos are which the confirmation calls for as boundaries. The hills and the plains are there also, and twenty-four miles away from them you see the mountains where the quick-silver mines are situated.

As matter of law and fact nothing can be more incontestable than this: That the *deseno*, the papers produced before the Commission, the grant, if there ever was one, and the conveyances between the parties, all fix the claim at one place, and anchor it fast to the two ranchos called for as boundaries. The decree which they made themselves does not pretend to give them any other land. Suppose it to be honest and still standing in full force, it authorizes no survey or location, except one which adjoins the two ranchos aforesaid. These calls being answered, the survey might be extended toward the plains and the hills, so as to include the proper quantity in a compact form. But even for quantity the survey could not go beyond these limits.

Mr. Upson, the Surveyor-General, has described in his testimony, and marked on his map in green, the exterior limits described in the decree. They include about seventy thousand acres. This survey, correctly laid down, according to the decree, on the side adjoining

Arias and Ursua, would leave out about fifty thousand acres on the other side of the green space.

Suppose this to be (what it is not) a floating grant which might be laid down anywhere within those limits, at the election of the grantee, he could not elect to include a mine or a settlement, or a purchase lawfully made by another person, within the same exterior lines, before the election of the grantor was signified. If, therefore, the New Idria Mine were in the green space, the claimants could not include it in their survey. The owner of a floating grant can not wait for an indefinite time without taking possession, or making a survey, or otherwise indicating where his location is to be, and then take a particular part of it to which special value has been given by the improvements of other persons.

But these points are, in this case, merely speculative. The mine is not there at all. McGarrahan could only take it in by disregarding all calls and transcending all limits. If this grant could take the mine, any other grant, true or false, in the whole country could take it just as well. If he could go away from his specific calls twenty-four miles, he could go anywhere. He might as well have laid his claim upon the city of San Francisco.

The decree was a fraud upon the United States, but this survey must bear the superadded infamy of being a fraud upon the fraud itself.

By whom was all this brought about? Nobody will pretend that McGarrahan himself did not do it. There can be no pretense of innocence here. He was after the New Idria Mine. His fabricated title and his fraudulent decree would do him no good unless he could also cheat in the survey. But to cheat in the survey was difficult as the law then stood. According to his own confession, he got the law changed by the use of influences grossly improper. By the use of similar influences he procured the appointment of a Surveyor-General that he thought would suit him, and made his appointee the willing tool of his fraud. It is hardly necessary to say that, while this confession must be taken as true against McGarrahan himself, it can not be justly allowed to injure the reputation of Mr. Beale, or the members of Congress whom McGarrahan accuses of aiding him.

McGarrahan, by himself and his counsel, has spoken as if he believed that this location of a fabricated claim twenty-four miles away from its calls had some technical virtue to strengthen his title. If you have ever been inclined to this notion, read the opinion of the Supreme Court of California in the case of *Maxwell vs. McGarrahan*. (28 Cal. Rep.) It was wholly void, and something worse than void, not only because it was inconsistent with the decree of which it pretended to be an execution, but because it was unauthorized and unofficial—a private act done at the dictation of the claimant himself—



clandestinely and secretly—behind the back of the parties interested—in the teeth of the law which required that full notice should be given them.

So far from strengthening his title by this false location of his claim, he completely destroyed it. He abandoned his claim to the four leagues adjoining Ursua and Arias when he went twenty-four miles away to get another tract which he thought more valuable.

Let me illustrate this: Suppose a man to assert that he had an agreement with some ancient proprietor of the land on which the city of Washington stands, for a lot adjoining two other well-known lots, near Rock Creek, at the extreme west side of the town, and he brings a bill against the heirs of his vendor for a legal conveyance of the lot so purchased, describing it exactly. Pending the suit he takes a fancy that he would rather have another lot three miles away, near the Navy-Yard, which has been occupied for twenty years and has improvements of very great value. He gets the lines of the latter lot run, and plot made furtively, unofficially, without authority or notice; thenceforth he begins to demand a conveyance of that lot as a specific performance of his agreement for the purchase of the other. Are not these claims mutually destructive? I submit to your judgment whether the false and fraudulent survey does not of itself cut the whole case up root and branch.

McGarrahan, having a fabricated title and a fraudulent decree of confirmation for one tract of land, with a private survey for another, thought himself ready to demand a patent. The misrepresentations which he used at the Land-Office were a repetition of his former assertions, with one stupendous addition. He insisted that his title was good; that his decree of confirmation was honestly obtained, and that his survey was on the ground described in the decree. He denied that any appeal was pending from the decree of the Circuit Court, or could be taken; and he made the Secretary of the Interior believe it. But that was not all. He assured the Secretary that the cause had actually been brought before the Supreme Court; that it was there argued by counsel on both sides (Ord for the appellees and Sloan and Hartman for the appellants); that after the argument the cause was submitted for final adjudication; that thereupon the Supreme Court delivered its opinion and entered a decree confirming the claim to the extent of three leagues. I need not say that this is all purely false; the truth is well known to be exactly the other way; but it was believed by the Interior Department, on the authority of "a duly certified extract from the minutes of the Supreme Court." No doubt such a paper was produced by McGarrahan, or else it could not have been recited in the draft of the patent. Who made it? How was it gotten up? Is it not one of the claimant's characteristic fabrications?

Influenced by these misrepresentations, the Secretary of the Interior directed a patent to be drafted, reciting the grounds upon which he thought himself justified; but it never was issued. Before it could be signed by the President, or the Recorder, or otherwise finished, so as to give it any virtue or force, the Secretary, admonished by the Attorney-General that such an instrument would be void and illegal, directed it to be stopped. The unexecuted paper is there to this day.

Afterward he applied to Secretary Browning for a patent, under the act of 1866. Here he admitted that his claim had been rejected by the courts.

To bring it within the act of 1866, it was necessary to show :

1. That he bought of a Mexican *grantee in good faith*.
2. That he had *used and improved* the land, and *continued* in the *actual possession* of it.
3. That such possession was according to the *lines of his original purchase*.
4. That no *adverse right or title* existed out of the United States.
5. That the land did *not* contain any *mine* of gold, silver, copper, or *cinnabar*.

In fact, and in truth, he had *bought in bad faith* from one who was *not* a Mexican grantee, and who *never pretended* to be a grantee of the land for which a patent was asked. *Neither* he nor anybody under whom he claimed had *ever used* or *improved* it, or been in *actual possession* of it for an hour. Of his *original purchase* he *never marked any lines at all*; he had ignored it utterly—abandoned it for other land; and of that other he took no possession, had made no use, and never improved it to the value of a cent. There *were rights and titles adverse* to his, under which many persons were in possession for more than fifteen years. Finally, there *was a mine* of cinnabar on it, and to get that mine in the very teeth of the law was the direct purpose and sole object of the application.

It was a mere matter of course that Mr. Browning should deny the absurd request. McGarrahan complained of the refusal to the local court of this district. The judges were induced to believe in the plaintiff's right; they affirmed their own jurisdiction to vindicate it, and, after *notice* to Mr. Browning, they issued the mandamus against Mr. Cox *without notice*. Mr. Cox would not submit. He took a writ of error, and the cause was argued for him in the Supreme Court by Mr. Hoar, the Attorney-General, and by Mr. Ashton, his assistant. The judgment was reversed, and the reversal was accompanied by some remarks not flattering to the honesty of the plaintiff or the sagacity of the court below. All which you may read at your leisure in 9 Wallace, 298.

It was after all this that he fell back on the patent of 1863. He professed to believe that the patent was signed, and when it was pro-



duced without a signature, he replied by accusing the Secretary and other officers of the Interior Department with the foulest crimes. Every record which contradicts his calumny is pronounced to be mutilated, forged, or falsified. I will not go over the evidence on this point. The character of the accused, the absence of all motive for the offense, the fact that no possible good or injury could be done to anybody by its commission, and the unequivocal testimony of the most respectable men, that it was *not* committed: these considerations make the charge too preposterous to be answered. The wonder is that two persons could be found on the face of the earth who would swear to it. But where there is a will there is a way. When Ahab and Jezebel wanted a vineyard which did not belong to them, they got two men of Belial and set them up before the congregation of the people to bear witness against Naboth that he was guilty of blasphemy against God and the king; which was not more false than the accusation that Cox committed forgery. The Jezreelite was stoned, and the American secretary was driven out of office, but it is now tolerably well ascertained that both of them suffered great wrong.

As early as 1861, when it became manifest to the claimants that the fraudulent decree of 1858 could not hold, they worked up another plot to get another judicial decision by means equally criminal. It was agreed among them that a suit should be instituted in their interests, but apparently for the benefit of the United States, and conducted by a District Attorney whom the claimants would nominate and bribe to give the cause away, as Ord gave it away before. This base plot could not succeed without the connivance of the Attorney-General's office, which they hoped to secure. It fell through, because Bates and Coffey could neither be imposed upon nor corrupted. All concerned in or assenting to this vile conspiracy were guilty of a great criminal offense. McGarrahan's admission, that he himself eagerly adopted it as "an entire new programme," covers him and his claim with infamy.

He brought several suits in California against the occupants and owners of the mine after the whole controversy had been finally and irrevocably determined against him by the Supreme Court of the United States—one upon his clandestine survey, another upon his patent, which was never made—and he prosecuted them with unprincipled pertinacity through all the courts.

Defeated, detected, and foiled in the courts, he has vexed every Congress with his appeals, and filled all the halls of this Capitol with his false clamor. His own admissions, as written out with his own hand, show that he has partially succeeded by means unspeakably base and grossly criminal.

Immediately after I expressed the opinion that the claim was unsound, and refused to dismiss the appeal, McGarrahan commenced his

personal abuse of me. He still seems to think that I am the author of his troubles, and the architect of all the ruin which has fallen upon his schemes. He does me honor overmuch. Any other person in my place would have done precisely what I did. No Attorney-General, faithful to his duty, would have suffered the Government to be robbed by such a bold and bungling fraud. No lawyer, of the least skill or ability, could have failed to defeat it. My expression of an opinion adverse to the legal validity of the claim, called out as it was by the claimant himself, and accompanied by unanswerable reasons, was certainly as proper as it was unavoidable. All impartial persons have approved it. No decent man will ever blame me for it.

But McGarrahan asserts that it was wrong in me to move the rescission of the order to docket and dismiss. By the use of a false transcript he had got the court to dismiss an appeal that never was taken, from a decree that was collusive and void. Should I have allowed him to keep the advantage which he had won by this foul play? I thought and still think that my intervention to defeat this trick was due to Judge Ogier, to the Supreme Court, to the interests of the United States, to the rights of their alienees, and to the cause of public justice generally. I did defeat it, by simply making the facts known to the court. If I had done less, I would have been a party to the outrage.

He says I used false evidence in support of the motion. The evidence consisted of Judge Ogier's official statement, the full record of the case, the letter of McGarrahan himself, suggesting the falsification of the transcript, and the sworn statements of the clerk and counsel concerned in, or connected with, the case. These proofs were so plainly proper and pertinent that the distinguished counsel on the other side made no effort whatever to suppress them. They were given as much time as they asked for to contradict them if they could. The report shows that Ord's own affidavit, which was not offered until after the argument, was then put in with my consent. Never was a judicial question, great or small, more fairly heard, more fully proved, or more justly decided.

It is said that the whole action of the court was wrong, because *ex parte* affidavits were read on the motion to dismiss. Such affidavits can not be used as evidence on a final hearing against a party who objects to them. But there is certainly not a man on this committee who does not know that they are perfectly proper, and always admitted as the ground for interlocutory orders, which do not affect any ultimate rights. They were justly and legally heard here, and heard without objection.

Another allegation is that the affidavits, or some of them, were drawn up by Mr. Gould; that they were false, and that I knew them to be false. An accusation like this, fished up from the oblivion of



twenty years, might be hard to answer as a general rule. But in this case there is no difficulty. How could I know that Mr. Gould had suborned witnesses to perjure themselves? What right had I even to suspect him of such a crime? He was known to me as a man of stainless reputation, surrounded by troops of friends. To this day I have heard no imputation upon his integrity except what has come from McGarrahan or his underground accomplices, and only from the lowest, even, of them. I believed the evidence upon which the court acted. I not only believed those affidavits to be true on every material point; they were in fact true. They were uncontradicted at the time, and stand now corroborated by the admissions of the parties, by the record of the court, by the statement of the judge, and by all the known facts of the case.

You are also told that both Judge Haight and the Supreme Court, at my instance, violated the rule which declares that a decision shall not be disturbed after a term has gone by. It is true that where a case has been heard and determined, and the whole record fully made up, it can not at a subsequent term be opened or altered to correct mere errors. But everybody knows, or ought to know, that the doctrine does not apply to collusive or fraudulent judgments, which are merely void, and may be so declared and treated whenever their true character is discovered.

Again it is charged that the Government, by exposing the misconduct of McGarrahan and Ord, created a prejudice against them both, which has been a great disadvantage to them ever since. There was no prejudice against them in any bad sense. It is true, however, that the revelation of their false, deceptive, and criminal behavior did raise a presumption that they were dishonest and unfit to be trusted in anything. It was impossible for McGarrahan to regain the status of a true man in a court which he had once grossly cheated. *Qui semel est malus semper presumitur esse malus in eodem genere.* Courts must not put honest men and detected knaves on a level—the logic of the law requires a difference to be made. It is right; it is just; it is always so; and God forbid that it ever should be otherwise.

The soul of this claimant is still further vexed by the fact that I have been, and am now, the counsel of private persons interested with the United States in defeating his fraud. He professes to believe that after I went out of office I should have dropped the case. So I did, but I took it up again on the retainer of the New Idria Company. I believe I have been employed three or four different times. What my fees were is a question between me and my clients, but McGarrahan is welcome to the admission that they were much larger than he knows of.

Is it pretended that because I had been Attorney-General, I could not afterward become a counselor in such a case? If that be true, I

have sinned much and often, and every other Attorney-General has habitually done likewise. Nearly all of them who practiced here have been concerned in this very same case on one side or the other—Mr. Reverdy Johnson, Mr. Cushing, Mr. Stanton, Mr. Evarts, and two Assistant Attorneys-General (Mr. Gillett and Mr. Coffey). Have all these gentlemen forfeited their honor? What they have done, not only in this but in many other cases, proves that the foremost men in the profession have regarded a practice in this line as perfectly legitimate.

But it is asserted that no attorney or counselor whatever had a right to appear and act with the Attorney-General, or aid him in the defeat of the Gomez claim, at the instance of the New Idria Company, and for a compensation paid by it. In other words, the alienees of the United States can not legally have their interests represented or their rights protected by counsel of their own employment, though they, as well as the Attorney-General, may desire it ever so much. With all possible patience I will give you the reasons on which the contrary view is grounded.

Here was a case in which Vicente Gomez and the United States were the nominal parties. But, in fact and in truth, they were not either of them the sole parties in interest, or even the principal parties. Gomez had sold his claim out and out to Ord and McGarrahan, and the United States had parted with a portion of their interest in the subject-matter of the controversy to persons who had increased its value by large expenditures of money, time, and labor. The real parties were Gomez and his alienees on the one side, and the United States and their alienees on the other. The vendees of Gomez employed their own counsel. At the final hearing, Mr. Cushing and Mr. Stone declared themselves in the service of McGarrahan alone. Doubtless McGarrahan, as the interested party on one side, could properly employ them, and pay them. But, if he could, what decent pretext can be set up for saying that parties on the other side had not a right to defend themselves?

I hope no argument is needed before you to establish the principle that in every judicial proceeding all persons are entitled to be heard whose rights of property are, or may be, affected by the result; that is to say, all persons by, or against whom, the record may be pleaded as an estoppel; and this includes not merely the nominal parties, but all others who are in privity of estate with them. Here, a final decree against the United States would have been fatal to the rights of the New Idria Company, just as certainly as the decree against Gomez was destructive to the pretensions which McGarrahan set up under him. No court ever ruined any citizen by a conclusive judgment against him, without giving him an opportunity to be heard.

All the most important of these California claims were argued by counsel who bore exactly the same relation to their clients that I did



to mine in this case. While in office I was associated in that way with the most illustrious men in the profession, and after I went out I became concerned in numerous cases for settlers, owners, occupants, and vendees of the United States against illegal, void, and fabricated claims. My successors, as well as my predecessors, believed the practice perfectly honorable, and encouraged it for reasons of policy as well as from a sense of justice. It was universally known, and as universally approved by bench and bar and country. No human being, so far as I know, ever made a suggestion that there was anything wrong about it, except McGarrahan or somebody in his interest.

The *gentlemen* who support the McGarrahan side of this case know very well that if they had been in my situation they would have acted as I did. If Mr. Carpenter, Mr. Wilson, Mr. Ingersoll, Mr. Shellabarger, or General Logan had been at the head of the Law Department when this claim made its appearance there, they would have shown it no favor at all. Either one of them would have exposed the falsified transcript and got the mandate revoked; either would have given instructions to strike out the collusive decree of confirmation and get an honest hearing in the District Court, and, failing in that, he would have demanded an appeal to the Supreme Court, and there he would have spoken up for a decision according to the very right of the cause. This either of these gentlemen would have done as public duty while in office, and if honorably retained afterward by a party claiming under the United States he would have continued his labors until his clients got justice.

But McGarrahan makes all official or professional opposition to his claim, however just and proper, a ground of personal quarrel. The fairest and most legitimate resistance to his fraud fills him with rancorous malice. Because I did not pronounce his fabricated title a good one he declared that he would suffer any annoyance, or encounter any personal risk, to get his *revenge* out of me. I do not doubt that he would poison me if he could. It would be mere suicide in me to drink from a cup in which he had an opportunity to drop strychnine, or to sleep in a room where he could stab me without being discovered.

Not less diabolical is the spirit he displayed to Mr. Stanton, whose life would not have been worth a pin's fee if he had held it at the mercy of McGarrahan. Yet the only offense which even his malignity ever charged against Stanton is that, being Attorney-General, he would not betray his trust—would not be corrupted by the present of a cadetship, worth in the market from three to five thousand dollars—would not accept a "slice" of the fraud, and go into the boat with him and Ord. Simply and solely because Mr. Stanton was honest and faithful, and for no other reason assigned or assignable, McGarrahan finds no name to call him by but *thief* and *scoundrel*.

You need not be told that Mr. Bates was a most learned lawyer, and a gentleman of unsullied character; nor is it worth while to remind you of the unflinching fidelity and vigorous talents with which his assistant, Mr. Coffey, performed his duties. But both of them adhered conscientiously to the opinion placed on record by their predecessor, that the fraud was a fraud and ought to be opposed; therefore, and therefore only, Mr. Bates is denounced as an imbecile, and Mr. Coffey as something worse.

Mr. Evarts made an argument in which the case was discussed with uncommon ability, and at the same time with the utmost candor and fairness, but it proved beyond a question that the claim was unsound, and that it had been prosecuted corruptly. The incontrovertible truth of the speech transported McGarrahan with rage, and he declared that the only way to deal with the author of it was to use the bullet and the bowie-knife upon him, and added, "It will come to that yet." He ought to be beheaded or disemboweled, and he (McGarrahan) would do it himself, if he could get nobody else to undertake it.

I am well aware that talk like this is generally thought to mean very little, and that is true if it be uttered by a ruffian at the moment when his coarse passions are suddenly roused. But when a swindler deliberately sits down and writes out to a confidential correspondent his intention to take the life of a man who has balked his fraudulent purpose, he shows his real nature. It means thirst for blood as plainly as the howl of the wolf.

Mr. Hoar argued in the Supreme Court the case of McGarrahan *vs.* The Secretary. He demonstrated the law of the case, and exposed the naked falsehood of the grounds upon which the plaintiff in error had got the judgment. Perhaps that natural law of right and scorn of wrong, for which he is so well known, was somewhat impressively manifested. This was the unpardonable sin, for which McGarrahan classes him with Evarts and others as a vagabond and a rascal.

The brutal language he uses about General Butler—too indecent to be repeated—might pass for a fool-born jest, if spoken in conversation, or it might be taken for the ribaldry of a braggart, if uttered in heat; but written and sent to an accomplice, it brings him squarely within Sir Michael Foster's definition of malice, inasmuch as it shows "a heart regardless of social duty and fatally bent on mischief." General Butler had supported him against the mining company until investigation made him doubt whether either party had a good right, and he expressed the opinion that the title was still in the United States. For this offense only he wants him disemboweled and mutilated.

It is curious how steadily he adheres to his one standard of right and wrong. All who refuse their aid to his fraud are rascals, black-



hearted, and base. He found the officials of the Government here unanimous in their opposition to his bogus claim. He applies his measure, and announces as the result that the higher the position the greater the scoundrel. He finds this to be especially true of the Lincoln Administration and its adherents, after trying it only ten days.

All judges who decide against him, or hold that his impostures shall not avail him in law, are abused with equal violence. Judge Ogier is bitterly maligned, and the judges of the Supreme Court are declared to be corrupt, partial, and dishonest.

The members of Congress who investigated the case and concluded that he had no right to property which was vested in others by the terms of a judicial decree, are spoken of in the same way. The House Committee of 1871 are reported upon in his letters. It looks to him, he says, as if Mercur was bought by Peters. Those who voted against the fraud are enumerated by name, and pronounced "all thieves without influence."

But the most inexcusable of all his slanders is that upon Mr. Cox, the Secretary of the Interior. I would not make individious comparisons between the several distinguished gentlemen who have graced that high office by holding it; but if there be one among them all whose unimpeachable purity, united with great talents, entitles him to stand *primus inter pares*, this special victim of McGarrahan's vituperation may safely claim to be the man. Of course he frowned upon the false pretense that McGarrahan was entitled to a patent on his rejected claim. He put his foot upon the lie that there was one in the office already signed by the previous President; he produced the unexecuted paper and showed that no signature was there; and across an unauthorized copy in the register he caused the truth to be written—that it was not a record, but the blunder of a clerk. McGarrahan went to General Grant with the charge that the Secretary had dishonestly altered and mutilated the records, to the prejudice of his rights. General Grant opened his ears to the slanderous story. Mr. Cox explained fully, and closed by saying that he had fought fraud with what vigor he could, and if he was not to be sustained, he wished to be relieved from the duty. But the mind of the President had become so biased by McGarrahan that he would not sustain his Secretary. Thereupon Mr. Cox was obliged to retire, with the blistering charge of forgery fastened upon him by an impudent impostor. McGarrahan gloated over his work; he thought the Secretary was ruined—his life's life lied away forever; and he raised the shout that "Cox was dead and damned." The sun in heaven never looked down on anything more basely unjust.

It is easy to repel the direct attacks of his malice upon the men whose fidelity to duty has made him their avowed enemy, but hard to

defend those whom he treacherously stabs while professing his gratitude and admiration. His hate is harmless, but his love blights like a pestilence. It is not the bite but the slaver that poisons. He is the hardest of all fraudulent claimants to deal with. If you oppose him, he pours out his malignity in torrents of vulgar abuse; if you support and defend him, he chuckles over your infamy, brags that he has bought you, and tells what price he is to pay for your conscience.

The distinguished and honorable gentlemen who support the claimants before you must be shocked beyond measure to find that others who have served the same cause as honestly as they serve it now are rewarded by imputations of the foulest corruption. Their natural impulse is to deny indignantly McGarrahan's accusations, that the advocates of the claim in Congress and in the executive offices were bought with a price. But, unfortunately, they can not make the proper defense without acknowledging that their client is utterly unworthy of belief in everything he says or swears about friend or foe. *Their* hands being tied up, the duty devolves upon *us*.

McGarrahan's general statements about his underground movements, and the evil influences he brought to bear, when considered in connection with the palpable dishonesty of the claim itself, are calculated to bring a certain amount of discredit upon all who have shown it the least countenance. But I am as certain as I am of my own life that many of these gentlemen, if not all of them, were sincere believers in the rectitude of the measures they voted for. They were not corrupted, but deluded by the artful though false accounts which McGarrahan and his accomplices laid before them. Against many of them he himself says nothing which, directly or indirectly, affects their reputation. It would be most injuriously wrong to infer from his mention of certain Senators and Representatives as great friends of his claim, that they were induced to take that side by any improper considerations.

Others, however, are brought within the range of his slanderous missiles by the lists which are found in the archives of the Panoche Grande Company. That corporation was entirely his own; he held all the stock; not a share of it could go into any other hand without his consent; every officer and manager was his agent and trustee. The lists, therefore, of the stockholders found on its books, and certified by its secretary, under the corporate seal, must have been made by his authority and under his direction, given in some form or other. If those lists were true, certain highly respectable gentlemen, and faithful servants of the public, would be rendered utterly infamous; for it would show that their enthusiastic support of a false claim was bought and paid for. But the lists are not true. They are clearly proved to be false, as regards several of the gentlemen implicated,



and, therefore, they are unreliable all through. *Falsus in uno, falsus in omnibus.*

Why did McGarrahan make these lists, or cause them to be made, certified, sealed, and put upon the records of his corporation for a perpetual memory? This is hard to answer. A man like him is always acting upon reasons which are incomprehensible to others. He may have intended to put this weapon away to be used *in terrorem*, or to punish recalcitration, if either of the men named should recover from their delusion, and incline to go back upon him. If this be not an explanation, I must leave the mystery unsolved.

But whatever may have been his motive or that of his coadjutors, these papers have no probative force against anybody but the authors of them. They can not affect others. They are but the written declarations of McGarrahan, and upon that testimony you would not whip your enemy's dog though he had bitten you.

Other members of Congress, with names known and honored throughout the country, are more directly aimed at and hit much worse. They threw the whole weight of their powerful influence in favor of the claim. McGarrahan makes charges against them which, if true, should have sent them to the penitentiary. If by his letters or his oath he succeeds in fastening these accusations upon his devoted friends, he has done them an injury compared to which his bullet and bowie-knife would have been visitations of mercy.

I meet all this with a sweeping denial. It is a rule of law clearly defined, well understood, and in modern times universally acknowledged, that where a party, admitting his own guilt, charges others with being his accomplices, the confession, though good against himself, does not furnish a spark of proof against the person he tries to implicate. This is not merely the legal rule, but in a case like the present it is the natural presumption which every just man will make. McGarrahan's statements, under all the circumstances, should be taken as strong *prima facie* evidence that the fact is the other way.

General Sickles always told me that he had no interest of his own in this claim. No doubt he would so swear if called upon now. He would deny positively that he ever carried to Stanton McGarrahan's proposition to go into the same boat with him; and he would vindicate himself sternly and strongly against the charge that he stole a letter out of the Attorney-General's office. But he was not brought here by either party, and he did not come of his own accord, because he did not think McGarrahan's slanders worth a contradiction.

Senator McDougall was a warm supporter of the claim, both in Congress and before the departments, and it may be true that he received considerable amounts of the stock, because there is some evidence which corroborates McGarrahan's assertion. But the fact is capable of being explained, and Mr. Carpenter's suggestion, that it

was given as the fee of his law firm in California, is probably correct. Any reasonable theory, consistent with innocence, ought to be adopted in the case of a man whom death has disarmed of the power of self-defense.

The same may be said of Mr. Hickman. That he advocated McGarrahan and his fraud through thick and thin can not be denied. But that he was the corrupt wretch McGarrahan makes him out to be is wildly improbable. It is incredible that he held a convocation at his own house to concoct that infamous scheme for getting a false judgment by bribing the District Attorney. That there was such a scheme, and that McGarrahan was intensely delighted with it and tried to carry it out, is no doubt true; but it will take better evidence than McGarrahan's to prove that Hickman was a party to it. McGarrahan runs his slander into the ground when he swears that he not only paid Hickman in stock, but bribed him with money, which Hickman accepted reluctantly. It is much more likely that he furnished money to McGarrahan; and his reluctance was expressed to find himself fleeced.

The two Blairs—one of them Postmaster-General and the other a leading member of Congress, expecting to be Speaker—are represented as being in such relations with McGarrahan that he fears he can not hold them without a cash retainer, which he expects them to demand. But, according to his own account, he held them somehow, and held them very tight. When the country was agonizing in the first throes of a great convulsion he astonished the public by absorbing the Blairs as well as other great statesmen. The cabinet officer came and went at his bidding, to fetch and carry and do his dirty work as he commanded. The member of Congress became the bond-slave of the fraud, and arranged the corruptest plans of promoting it against all justice and all truth; for which services he was paid by large slices of stock. The survivor of these two brothers has publicly declared that he never had a dollar of the stock, and does not believe that the deceased one ever had. We accept this denial. I go further, and I assert that Montgomery Blair never, at any time, did anything in this business but what he might honorably do for a client by whom he was legally retained after he went out of office. As to Frank Blair, neither McGarrahan's letters, nor the records of his swindling corporation, nor his oath, can justify the belief that he would so prostitute himself. No son of his great father would "sell the mighty space of his large honors for so much trash as could be grasped thus."

He does not stop with maligning his executive and legislative friends. The surveyors who served him by surreptitiously laying his claim where he wanted it, and the District Attorneys that he relied on to favor him, were acting, if he tells the truth, for bribes, which he paid, or promised to pay them. He takes care that even the judges



who decided in his favor on any branch of the case, shall not have credit for impartiality or fairness. Judge Haight was pledged before his appointment to resist all the influences of justice; and while his application for a mandamus was pending against the Secretary of the Interior, he represents the judges of this district as listening privately to the most indecent solicitations, and making secret arrangements about their decisions. He describes them as loafing in his room, drinking his whisky, and discussing his case with him over their cups. His picture makes them a disgrace to the administration of justice. He permits nobody to escape his filth. Like a foul bird of prey, his obscene droppings are everywhere, and always most offensive in the most sacred places.

It will be said that—it has already been said—that this is irrelevant matter. I maintain that it is eminently proper and just to put the absent and the undefended in their proper places. Do you think we should allow such calumnious accusations to pass unrebuked and uncontradicted merely because they concern men who have been our opponents? Shall we, if we can help it, permit these aspersions to rest like a dark cloud forever on the memory of innocent people? No, by the honor of the living, and by the green graves of the dead, we will not.

To let them stand wholly without denial would be extremely dangerous. The world will ask why, if they are false, did McGarrahan make them against his friends? His slanders upon us can be understood; his malignity accounts for them. But these are men for whom he professes admiration, respect, and gratitude. That he should deliberately impute crime and corruption to them is amazing, unless it was true. I repeat that I am not bound to account for McGarrahan's conduct. He is not like other men. The whole make-up of his mind is abnormal. He manifestly believes that a public officer who performs his duty, unawed by influence, and unbribed by gain, is unworthy of the slightest respect. Such a man he uniformly calls *thief* or *scoundrel*; thinks he ought to be impeached, and wants to kill him or take his bowels out. In his estimation, therefore, a member of Congress, or an executive officer, honors himself by being unfaithful to his trust; he considers him meritorious in proportion as he is corrupt; and this explains the strange fact that he mingles his charges of dishonesty with terms of endearment and eulogy. It is his way of praising his friends.

That is one explanation; there is another: Franck, to whom most of these letters were addressed, had a little money. McGarrahan took him into the fraud, and dazzled him with the prospect of becoming a millionaire. To inspire him with confidence, and make him bleed freely, it was necessary to tell him that these powerful gentlemen were enlisted heart and soul in the same enterprise, and he would not credit

that unless he was convinced that they had a pecuniary interest in it. McGarrahan did not scruple to practice the proper amount of deception.

But somebody may ask why we did not suppress these scandalous papers. We introduced them here for a purpose eminently proper—to show that the claimants had been prosecuting their case in the courts, in the Land-Office, and in Congress by appliances that were grossly immoral and deceptive. The letters do make that perfectly clear. They are the claimant's confession that he has acted throughout, from the beginning to the present time, as nobody would act who was not a most redemptionless rogue. As against him they prove with irresistible force that the case is saturated with corruption. It was unlucky, to be sure, that he did not put the admissions of his own guilt and his charges against other persons in separate papers. He joined them together so that we could not exhibit one without the other. That was no fault of ours. We have done our best to prevent them from injuring the innocent, and we produced as few of them as possible. We have hundreds more behind these. If our learned friends on the other side knew how much of this scandal we *did not* show, they would not complain of what we *did* show.

I might extend these remarks, but, *cui bono*? You know the history of the fraud. You will decide according to your duty. Our exposure of it may be a warning to prevent others from engaging in such affairs. At all events, we expect that no prudent man will ever again go into this leaky boat of McGarrahan's; for all who do are sure to be wrecked sooner or later. It is a fatal, a most perfidious bark, "built in the eclipse, and rigged with curses dark."

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#### FEDERAL JURISDICTION IN THE TERRITORIES.—RIGHT OF LOCAL SELF-GOVERNMENT.

BEFORE THE JUDICIARY COMMITTEE OF THE HOUSE OF REPRESENTATIVES.

*Mr. Chairman and Gentlemen of the Committee:*

I AM here with your permission, and at the request of the people of Utah, to discuss their rights and the powers of the Federal Government to control them.

If you think for a moment how much they may suffer by your legislation, and remember that they have no vote in either House of Congress, I trust you will hear without objection the defense of their counsel, and permit him to show, if he is able, that the hostile measures passed and proposed against them are unjust and unconstitutional.

Though I claim nothing for those people on the score of their



merits, yet their behavior and character ought not to be misunderstood. It is said (with how much truth you know as well as I) that they are sober, honest, peaceable, upright, and charitable, not only to one another, but to the stranger within their gates. The records show them to be singularly free from the crimes forbidden in the Decalogue, and not at all addicted to the vulgar vices which often deform the character of frontier communities. Their territorial government has been conducted with surprising purity, wisdom, and justice. Simple in its machinery, and impartial in its laws, its burdens are light and its protection universal; no cheating at elections, no official defalcations, no special taxes, and not a dollar of public debt.

They profess almost universally a religion of their own, for which they are daily reviled and insulted; but they make no legal discrimination against the faith of those who dissent from them; there is no trace of intolerance in their enactments, and the constitution framed by themselves, and under which they ask for admission as a State, guarantees to every human being the most perfect freedom in matters of worship and conscience. Nowhere on earth has the value of local self-government been so strikingly attested by the success of the people who enjoyed it. Thirty-six years ago the valley of Salt Lake was the most forlorn and dreary region on the surface of the globe—a mere waste, which produced literally nothing. But under the stimulus of civil and religious liberty these Mormons struggled against all the obstacles of nature. By a system of irrigation, amazing for its extent, ingenuity, and cost, they brought ample supplies of water from the distant mountains down upon the plains, and by their persevering industry they converted that rainless desert into a land of plenty, covered with fruitful farms and thriving towns.

I think that, under these circumstances, it would be an infinite pity to strike the Territory of Utah with the curse of political slavery, to deprive the people of their local government, and deliver them up, naked and defenseless, to be sacked and pillaged by their enemies. But let it be understood that I am not asking for mercy. If you have the constitutional power you must exercise it as you please.

There are many reasons which naturally incline an American statesman to do all the harm he possibly can to the people of Utah. They are powerless to resist it. They have not a single vote in the National Legislature, and can not exercise the slightest influence on a presidential election. They are excluded from all political rings; they can not be anybody's competitor for the spoils of office; they can make or mar no scheme to save or squander the public money. On the other hand, the whole country outside of their own Territory is populous with their enemies, whom you must conciliate and gratify if you can do so with a safe conscience, for they have votes, and power and influence which will not be opposed without danger.



The religion which the people of Utah adhere to with so much tenacity is regarded in other parts of the country with extreme dislike, as the mere superstition of an upstart sect. No man, however, who has the faintest perception of Christian principles, thinks it right to kill or plunder or outlaw them for holding an erroneous faith. From real Christianity there comes no howl for the blood and property of the Mormons. But in other quarters the most rancorous hatred breaks out. By some famous preachers the policy of killing the Mormons by wholesale, unless they leave their property, abandon their homes, and flee beyond the Union, is openly advocated, and apparently concurred in with great warmth by congregations supposed to be respectable; and this is accompanied with curses loud and deep upon all who would interpose a constitutional objection to that method of dealing with them. When we read of such things in history we are apt to think them diabolical. But approved as they are now and here by popular judgment, and unrebuked even by senatorial wisdom, we must concede, I suppose, that it is very good taste and refined humanity disguised in a new dress. As a general rule, political piety, wherever it has turned up the whites of its eyes in this country or in Europe, is a sham and a false pretense; but in this exceptional case it would be speaking evil of dignities to call it hypocrisy. The soundness of the religion which slanders a Mormon is not to be questioned. Equally pure is the act of a returning-officer who fraudulently certifies the election of an anti-Mormon candidate, known to be defeated, by a majority of more than fifteen to one, nor will we attribute any sordid motive to those residents of Utah, official and private, who busy themselves here and at home to break down the territorial government, seize its offices, and grab its money. Their righteous souls are vexed from day to day by the mere fact that sinful men are allowed to live peaceful and prosperous lives. They are animated solely by disinterested zeal for the advancement of the Lord's kingdom, which in their judgment would be much obstructed by the further continuance of free government in Utah.

But the case does not depend on the merits or demerits of the parties. It is not a question what measure of punishment the people of Utah deserve for their wickedness, but what Congress has a right to inflict. Whatever may be the superior sanctity of the holy men who promote this legislation, they can not be gratified at the expense of a breach in the Constitution. If you shall be satisfied that you have no power in the premises, you will not usurp it; for that would be a hideous crime, of which you are wholly incapable. Before I go further let me vindicate the justice of this censure, not because you doubt it (for that is impossible), but merely to stir up your pure minds by way of remembrance.

Mr. Grote, the most learned and thoughtful of modern historians,



has shown by divers examples that fidelity to the fundamental law—which he terms *constitutional morality*—is the one indispensable condition upon which the safety and success of every free government must depend. The high career of Athens, from the expulsion of the Peisistratids to a period after the death of Pericles—the marvel and the admiration of all time—was plainly due to the faithful practice of this supreme virtue. It was this that made the steady Roman strong enough to shake the world. England observes not only the theories but the minutest forms of her constitution, when legislating for her own people, and that has given her domestic tranquillity and solid power at home; her shame and her misfortunes are all traceable to the disregard of it in dealing with colonies and outside dependencies. Constitutional morality was cherished and inculcated by our fathers, in the early ages of the Republic, as the great principle which should be the sheet-anchor of our peace at home and our safety abroad, and, to the end that it might never be forgotten, they imposed a solemn oath upon every legislator and every officer to keep it and observe it with religious care at all times and under all circumstances. In contrast with the self-imposed restraints of the American democracy, Grote mentions the French, a nation high in the scale of intelligence, but utterly destitute of attachment to any constitution or any form of government, except as a matter of present convenience. You know what came of it—eleven revolutions in less than eighty years—a history filled with wrong and outrage—a people forever alternating between abject slavery and the license of ferocious crime.

It is as plain as the noonday sun that without constitutional morality every pretense of patriotism must be false and counterfeit. The man who says he loves his country, and yet strikes a fatal blow at the organic law upon which her life depends, shows his sincerity as Nero proved his filial affection when he killed his mother and mutilated her body.

A violation of constitutional law is not an offense which is ever made venial by the occasion. You can not do evil that good may come. The evil is there, and the good never comes.

No matter how unimportant the breach may seem; though small at first, it will widen like a crevasse in the Mississippi, until the whole stream of arbitrary power goes rushing through it. Besides, the grade of a crime is not measured by the extent of the particular mischief. Forgery is forgery, whether the sum obtained by it be great or small, and murder is not mitigated by showing that the victim was short of stature.

It often happens that legislators, as well as other men, feel themselves hampered by such restrictions; but that does not authorize disregard of them. You can not break lawlessly over the Constitution because it confines you to limits inconveniently narrow.

In this country all men and all classes are equal. No one can lawfully say to another, "Stand aside, I am holier than thou," and push him from his place on the platform of the Constitution. Superior sanctity is not a thing to be safely believed; it is easily simulated; it is often false; and, when it comes into politics, it is almost universally put on to cover some base and malicious design. The Scribes and the Pharisees were hypocrites.

The party whose rights are injuriously affected by vicious acts of Congress outside of the Constitution may be weak and defenseless, the inhabitants of a distant Territory, and the members of an unpopular sect whose complaint can not reach the general ear, and would excite no sympathy if it did. But these are the very considerations which plead most strongly against the usurpation of ungranted power to destroy them. This is no appeal to your magnanimity, but a mere suggestion that the Constitution was made most especially for the weak.

We are not all agreed about the wisdom of the Constitution, or the virtue of the men who made it; but whether you like or loath it, you are equally bound to obey it. You do not lessen this obligation one whit by railing at it. When you break it you do not diminish your guilt in the least by calling it an agreement with death, and a covenant with hell.

Nor can you change the nature or lessen the degree of the wrong by your own contemptuous feeling for the object. He may be altogether unworthy of your favor, but you owe him justice, and you must pay the debt to the uttermost. A legal right is, in and of itself, a very respectable thing, however much you may hate and despise the man, or body of men, that sets it up.

Moreover, constitutional morality means general morality in all things public and private, and the converse of the proposition is also true. Political power, under our system, is a trust given and accepted upon certain covenanted terms, and to be executed within certain limitations. A willful breach of this trust, by transgressing its limitations, perverting its purposes, or violating its conditions, is an act of personal dishonesty which not only corrupts the officer who commits it, but demoralizes all other citizens who are tempted by their personal or party attachments to defend or apologize for the wrong. Thus the floodgates of iniquity are set wide open—all that is pure in morals, all that is perfect in politics, all that is holy in religion, are swept away; the public conscience swings from its moorings, the baser passions become masterless, and rapacity riots in the spoils of its lawless victories. If you are not satisfied with a free Constitution, honestly obeyed, give us a despotism, but save us from a rotten republic if you can.

I have not offered this feeble and faint support to the doctrine of



constitutional morality because I suppose you to be against it, but for quite a different reason. I know very well that I am not addressing men who claim that their own resentments or their own interests are a higher law than the Constitution they have sworn to support, or a better rule of action than the law of God, which commands them to keep their oaths.

Let us see whether the measures passed and proposed against the Territory of Utah and its people are or are not open to objection on the score of immorality.

The constitutionality of the act of March 22, 1882, has been much and seriously questioned as an invasion of religious freedom. That is not my point. A mere sin against God, not affecting the relations of man to his fellow-man, false worship, heterodox belief, erroneous teaching, bad systems of ecclesiastical discipline : these are placed by our Constitution beyond the reach of human legislation. But any overt act, detrimental to society in general, or injurious to the public, may be forbidden by the State, and the offender can not justify himself by showing that it is right according to his interpretation of the divine will. A Jew believes it his religious duty to take the widow of his deceased brother and raise up children by her, though he has a wife and family of his own ; but that is adultery by the law of the land, and he can not nullify the law by pleading the revelation to Moses. A Seventh-day Baptist may be compelled for the temporal convenience of others to keep Sunday as a day of rest, though his conscience assures him that Saturday is the Sabbath of his God. One who has no faith at all is protected as well as one whose faith is wrong, but if the infidel insults or annoys his fellow-citizens, by uttering his loose blasphemies at improper times and places, the law may check him with a penalty. It is sometimes difficult to see with certainty whether a particular act falls on one side or another of the line which divides the domain of conscience from that of the secular ruler. In doubtful cases, the civil authorities have the right of decision, or, as Judge Gibson expressed it, the courts have the last guess.

My clients, or at least the leading teachers and jurists among them, are unshaken in the belief that marriage, being ordained of God and a sacrament of the Church, can not be rightfully interfered with by the State. For the practical purposes of the present case it does not matter whether they are right or wrong about that.

Conceding the authority of the State, the question arises, who is the State ? Where is the civil power to control them vested ?

They assert that this power resides in their own government, and can be exercised only by their own legislature ; that in this, as in all things of purely local concern, they are their own masters, with a perfect right to govern themselves. Therefore they hold that the forcible interference of Congress in such affairs, whether it be or be not an in-

vasion of their religious freedom, is beyond all doubt a plain and palpable infraction of their civil liberties.

The opposing theory, carried out to its logical consequences, is that they are not a free community, but a body of mere slaves, subject in all matters of every kind to the will of Congress—a body in which they have no representation, and composed of strangers, perhaps of enemies, who will take pleasure and give pleasure to their constituents by the most injurious legislation they can invent against the people who are subject to it. The underlying question is, therefore, that of jurisdiction, which you are obliged to determine before you can know whether you are passing a law, or merely disgracing the statute-book by an act of gross usurpation. If it be *ultra vires*, it is not only a violation of constitutional morality, but as void as an ordinance on the same subject passed by the directors of a private corporation.

Perhaps it may be worth while to inquire for a moment how this conflict of jurisdiction came about. It started thus: The Mormons, being successively driven out of Ohio, Missouri, and Illinois, took their religion with them to the wilderness of Utah. To us it is false. But that is truth to them which they believe to be true. Their faith in their own creed is proved by their works, and sealed with more suffering than any other sect in modern times has ever endured. It is all nonsense to doubt their sincerity. Nobody does doubt it.

It is a part of this religion that plural marriages are in some cases righteous and proper. Their Church teaches that, and they made no laws to punish its members for acting according to their belief. This simple forbearance of their government to fine and imprison people for doing what they all believed to be right is the head and front of their offending. How could any sane person expect them to do anything else? They had the misfortune to believe, implicitly and almost unanimously, as an article of religious faith, that polygamy was not wrong. How could they make it a penal offense without subverting their civil institutions? You might as well ask a people to punish one another for their complexion, the color of their hair, or the shape of their bodies, common to and admired by all. They simply could not either make or execute such a law. As an organized community they must have perished if they had undertaken it.

Because they would not and could not take this destructive course, they are supposed to be guilty of such heinous wickedness that they are hardly fit to live on the same planet with us.

The law which they could not make for themselves, because their judgment condemned it as unjust and impolitic, is now to be made for them and thrust down their throats "against the stomach of their sense." Their government refused to commit suicide; therefore it ought to be murdered.

The question whether you can constitutionally legislate on this



subject involves the entire right of self-government. It covers the whole ground between freedom and slavery. The formation of the family, marriage and divorce, the legitimacy of children, the succession to property, these are the most purely private, domestic, and local of all subjects to which human legislation can apply; and if your right to control a people in these respects be conceded, there is nothing else on which your jurisdiction can be denied. You can make your laws good or bad, as you please, and they are as binding one way as the other. That they will be very bad is not an idle apprehension; for you will be impelled by strong motives to legislate without the smallest regard for the rights, interests, wishes, or feelings of the people concerned.

If you can forbid polygamy where it is believed to be right, you can force it on a community that holds it in detestation. You can divorce every man from his wife or wives, whether he has one or many. You can abolish the institution of marriage entirely, strip all men and all women of their conjugal rights, bastardize all their children, and bring on the reign of universal free love. If you can imprison, disfranchise, and disgrace a man for marrying the woman he lives with, there is no reason (I mean no legal reason) why you should not patronize adultery and honor the brothel.

This omnipotent power of Congress, which makes and breaks the matrimonial contract, extends to all the relations of private life. That of parent and child necessarily goes with it; ancestor and heir follows, of course, and, by parity of reasoning, master and servant are included. Then why not debtor and creditor, landlord and tenant, vendor and vendee? What shall hinder you to take away the testamentary power, forbid administration of a decedent's estate, regulate all business, and stop all work except what you and your constituents approve?

To carry into effect the laws already passed, it is necessary and proper that you should have a police-force composed of spies and delators, who will thrust themselves into the kitchens and bed-chambers of all families, employ eavesdroppers who will watch them at key-holes and windows, or, in default of that, change the rules of evidence (as a committee of the Senate has actually proposed) and compel the lawful husband and wife to testify against one another in contemptuous defiance of the great principles which protect the sanctities of the family, and lie at the basis of civil society.

It is perfectly clear that if your claim to exclusive jurisdiction be established, so as to comprehend the power to punish men and women for making family arrangements which you disapprove, you have authority to define all offenses: anything is a crime which you choose to call so, and everything is innocent which you think proper to tolerate. You may therefore make an entire criminal code for them, and you

may make it as pernicious as you choose. It need not be "a terror to evil-doers, or a praise unto them that do well," if you wish to have it otherwise. The virtue may be visited with penalties; justice, chastity, temperance, and truth may be sent to the penitentiary; swindling and perjury may be legalized. Taking the exceptional jurisprudence of Sparta as a model, larceny may become a merit; or, following a more recent precedent in the Congressional government of the South, you can maintain the worst men in the highest offices, throw the reins loose on the neck of rapacity, make leprous fraud adored—

"Place thieves,  
And give them title, knee, and approbation,  
With Senators on the bench."

If you have not only the right, but the exclusive right, to do this, it must be acknowledged that there is no use for a local government; it is merely in your way, and accordingly you have already begun to abolish it. Agents appointed under your laws have gone down with instructions to take possession of all the polling-places and registration-offices, and the people were expressly forbidden to vote except by their permission and under their supervision. They construed your law as a bill of pains and penalties which attainted the whole population, and they ordered every voter to be disfranchised who would not take an expurgatory oath that covered his whole life. Another set of agents assert that they have your direction to seize all the territorial offices, and distribute them as booty among the enemies of the people. One more step, an easy and a short one, you are much urged to take, and that is to send a commission upon them with power, not only to supervise them when they vote, and deprive whom they please of the ballot, but to make and execute all laws on every subject, and to govern them generally as an overseer might govern a plantation of slaves.

Of course it is possible that the Territory might be controlled justly, wisely, and moderately by the hirelings of the Federal Government. But the chances are a thousand to one that they would act as persons in that situation have always acted: oppress and plunder their subjects, steal their money, and tax their industry to death. This might provoke the resistance of the most patient people, and the first symptom of disorder would furnish a legal excuse for cutting them up root and branch. Arbitrary rulers pardon nothing to the spirit of liberty.

Has Congress this exclusive power of legislation for a Territory? Or does it belong to the people of the Territory and to the representatives whom they have chosen to intrust with it? I maintain that the right of local self-government is founded on acknowledged principles of public law; it existed before this Government was framed, and the



Constitution reserves it to the people of the Territories as distinctly as to the States.

Look at the practical case : citizens of a State or of several States leave the place of their residence and go out with their families to colonize themselves on the public domain of the Union, beyond the limits of any State. They buy the land and settle upon it with the consent of the General Government, to which it belonged, whereby they became a separate body detached from all others. Have they ceased to be free ? Did they leave their liberties behind them ? Have they not a natural right to regulate their daily lives and adjust their private relations by such laws as they think will be most suitable to their condition and best promote their interest ? Yes, they have, unless they are slaves ; for the freedom of the community results necessarily from the freedom of the individuals that compose it.

I do not assert that they can govern themselves in a way forbidden by the Federal Constitution, or by an act of Congress passed in pursuance thereof. The people of a State can not do that. What I do assert is that Congress can not legislate for a Territory on any subject-matter on which it can not legislate for a State. This furnishes an easy and infallible test of constitutionality. If Congress may regulate marriage and divorce in a State it may do so in a Territory ; if not, not.

It is true, also, that the General Government may give the colonists a charter, and call it an act of incorporation or an organic law. This was what the imperial government of England did for the several colonies that settled on its lands in America. But the charter must be a free one. If it abridges the liberty of the people to do as they please about matters which concern nobody else, it is void. Even if the colonists would consent, for a consideration, to accept an organic law imposing a restraint upon their right of self-government, they could throw it off as a nullity ; for the birth-right of a freeman is inalienable. I need not say that foreigners naturalized are on a level with native citizens.

As Congress can not give, so it can not withhold, the blessing of popular government in a Territory. But the legislation now proposed, in addition to that already passed, would blacken the character of the Federal Government with an act of cruel perfidy. The charter you gave to Utah was in full accordance with the broad principles of American liberty. You organized for them a free territorial government, put into their hands all the machinery that was needed to carry it on ; the ballot to be used under regulations of their own ; officers chosen by themselves to administer their local affairs, collect the taxes and take charge of their money ; and a legislature representing them, responsible to them, clothed with exclusive power to make their laws, and to alter them from time to time as experience might show to be just and expedient. Gilding your invitation with this offer of free

government, you attracted people from every State, and from all parts of the civilized world, whose industry scattered plenty over that barren region, and made the desert bloom like a garden. Now you are urged to break treacherously in upon their security—supersede the laws which they approve, by others which are odious to them; make their legislation a mockery, by declaring that yours is exclusive; drive out the officers in whom they confide, and fill their places with raging and rapacious enemies; take away their right of suffrage, and with it all chance of peaceable redress; break down the whole structure of the territorial government, under which you promised to give them a permanent shelter. Would not this be a case of Punic faith? Apart from all question of constitutional morality, the conduct of the wrecker who burns false lights to mislead the vessel he wishes to plunder does not seem to me more perfidious. If it has the same appearance to you, it will be swept away with the scorn it deserves. But let us keep to the point of law.

The relations of the colonies to Great Britain were precisely the same as those which exist between what we call the Territories and the General Government of the United States. By the public law of the world the colonies had the right of local self-government. The imperial Parliament, omnipotent at home, was utterly without power to legislate on the domestic affairs of any community settled upon crown lands sold or given to them on this side of the Atlantic. This freedom was not only asserted by the colonists, but for more than a century they were allowed to enjoy it without disturbance. The exclusiveness of their right to legislate for themselves, the extent to which it was exercised, and the range of subjects it embraced, are known to all who have read their history.

In those days the doctrine of perfect religious freedom was unknown; it was regarded as a proper function of the civil authority to punish whatever it deemed false theology. This power, like others, belonged to the colonies. When heretics, proscribed in England by the laws in force there, fled beyond the sea and organized a colony, they not only escaped persecution, but acquired the right to persecute others. By some of the colonies this power was much abused; but the Parliament could not interfere to prevent it. The king sent Lord Baltimore and a large body of his retainers to Virginia with a grant of land and a letter to the colonial authorities requesting that he might not be molested on account of his religion. The colonial legislature resented this as an interference with their established right of self-government, and replied to the king that if Lord Baltimore practiced the Catholic religion within their territory he must submit to such penalties as they chose to inflict. The royal mandate was withdrawn; Lord Baltimore was moved above the Potomac, where he and his friends erected a colony of their own, and that colony excited the



disgust of Parliament and the indignation of Virginia by tolerating all kinds of religion.

I mention these things to show that self-government in its broadest sense was claimed by and conceded to the colonies. Then home rule extended to matters of religion, as it did to all other affairs within the scope of the civil authority. Here and now the conflict between Federal power and the rights of a State or Territory could not take that shape, inasmuch as legislation on such subjects is excepted forever out of the power of all government.

But suppose by a stretch of your imagination that Parliament, led by some ultra Tory, had undertaken to prescribe what family relations should exist in a particular colony, provide the severest penalties to enforce the regulations by penalties in direct conflict with the popular sense of duty and against pre-existing laws, customs, and opinions. What would history have said about such a Parliament? But suppose, further, that the same Parliament, to remove impediments from the way of its act, broke down all the free institutions of the colony, forbade trial by jury unless the jury was packed, disfranchised the legal voters, prevented elections that were not supervised by agents of the ministry, ordered the expulsion of all officers already chosen, and replaced them by avowed enemies, with power to tax and cheat them at will. Could such measures as these against any of the colonies have found one unprejudiced and honest defender in the world?

In fact and in truth nothing nearly so atrocious was proposed or attempted. The stamp act, the tax upon tea, the prohibition of certain manufactures, the Boston port bill, and other restrictions upon trade, were trifles in comparison. But they reached the vitals of civil liberty simply because they denied the principle of perfect home rule in the colonies; they asserted a jurisdiction in Parliament which was inconsistent with the right of the colonies to govern themselves in matters which affected their own rights, interests, and feelings. Therefore those measures kindled a blaze of indignation in every colony. All true men in America pledged their lives, their fortunes, and their sacred honor to "throw off the shackles of usurped control," and in the outcome they did "hew them link from link." The friends of liberty in England sided with patriots here. Burke and Fox made the defensive sophistry of ministers contemptible; Chatham declared that if Americans submitted they would become slaves themselves, and fit instruments to enslave others. "I rejoice," said he, "that America resisted."

If there be anything fixed, established, and undeniable as a proposition of public law, it is the natural right of a free community like Utah to govern itself. It is impossible for a member of Congress not to know that the success of our Revolution was an acknowledged triumph of that principle. English and American supporters of Lord

North's ministry may have been conscientious in their opposition to this doctrine, and upright statesmen may dissent from it now ; but it is not easy to see how any man can believe in the rightfulness of these aggressions upon Utah, except for reasons which would have made him a Tory if he had lived in the time of the Revolution.

I have said that these people have a natural right to govern themselves ; but I admit that this natural right may be abridged by fundamental arrangement. That is to say, the right of legislation for a Territory upon some subjects or all may be taken away from the people and vested in Congress by the Federal Constitution. Would it not be a shocking surprise to discover in that instrument a provision so hostile to the liberty for which they had fought and toiled for seven years ? You will find upon looking at the Constitution that it is not there.

But the unlimited sway which the power of exclusive legislation would give has, at different times in our history, been much desired by members of Congress and by friends of theirs who cast their covetous eyes on offices and property which did not belong to them. Before the industry of Utah had made it rich enough to be worth robbing, the notion was started that if the Southern States could be reduced to the condition of Territories, the absolute domination of Congress over them through the instrumentality of carpet-baggers and bayonets would become constitutional. Therefore the first step was to declare that the State governments did not legally exist ; the States were said to be Territories, and, as a consequence, supposed to be at the mercy of Congress.

Mr. Thaddeus Stevens, the great leader and driver of that day, who ruled Congress with a sway that was boundless, thought it best in the beginning to assure his followers that the Constitution had given to Congress this power over the Territories. To prove it he showed them the following provision :

"The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory and other property of the United States, and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular State."

That this expressed nothing, and meant nothing, and granted nothing to Congress, except the power to exercise for the General Government its purely proprietary rights over the land and goods it possessed, whether lying within the States or outside of them, was so perfectly manifest that Mr. Stevens became disgusted with his own argument ; he freely expressed his profound contempt for it, and for all who pretended to believe it. Having drawn them into it by his glozing speech, his fierce invective lashed them out again ; and he so "chastised them with the valor of his tongue," that they feared to



speaking of scruples any more. He did not, because he could not, furnish them any other pretense to stand upon ; and he told them plainly and frankly that he would not stultify himself by professing to think his measure constitutional. "This," said he, "is legislation outside of the Constitution." It was passed, and Congress inaugurated the reign of the thief and the kidnapper by an acknowledged usurpation.

The outrages upon liberty in Utah are not grounded on the theory which Mr. Stevens exploded. It is not now pretended that the forcible rupture of private relations, seizure of ballot-boxes, disfranchisement of voters, expulsion of territorial officers, are needful rules and regulations for the disposal or use of Federal property. "The Edmunds' bill" (which could not have been drawn by the Senator of that name) assumes and expresses the assumption, in unequivocal words, that *the United States have exclusive jurisdiction in a Territory*. This is much worse than the other ; it is not merely a false construction of the Constitution : it is an attempt to put into the Constitution what is not there.

When a man who knows anything about American institutions asserts that the United States have exclusive jurisdiction in a particular place, he means to say that the Constitution has given to the Federal Legislature and Executive the sole authority to make and enforce all laws in all cases for and against all persons in that place. There are places in which this omnipotent and exclusive power is given to Congress, but to say that it extends to Utah or any other Territory is simply false. Look at the Constitution and see for yourselves. Among the enumerated powers of Congress is this—

"To exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding ten miles square) as may by cession of particular States, and the acceptance of Congress, become the seat of Government of the United States, and to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings."

There is the only grant of exclusive jurisdiction that can be found in the instrument. It is plainly intended to and does cover the District of Columbia. The authority is granted with equal clearness over the places occupied by the forts, arsenals, magazines, and dock-yards ; but does it say that it may be exercised in the Territories ? No ; "it is not so nominated in the bond."

This is no point of interpretation, strict or loose. Whether the Constitution grants or does not grant the power of exclusive legislation over the Territories to Congress is a question of fact to be determined by mere inspection. The ocular proof that no such grant is there can not be overcome, or in the slightest degree weakened, by any

kind of construction, however smart; much less can the omission be supplied by a bald interpolation.

If the power is not given to Congress in and by the Constitution, then Congress has it not at all. This is a Government of enumerated powers. It is part of the instrument itself that powers not granted are reserved.

Nobody has ever been mad enough to say that such laws as these against Utah could be enforced against a State? Why? Because the Constitution gives Congress no jurisdiction or authority to pass them. But it does give exactly the same power of legislation over a State as over a Territory. The right of freemen to be exempt from the scourge of the central power is, therefore, as well secured in one as in the other.

The powers not granted to the United States are reserved to the States respectively, or to the people, and the enumeration of particular rights expressly retained does not disparage or deny others on which the instrument is silent. This being the express rule, it will hardly be asserted that the power now in question is not reserved. To whom is it reserved? To the States respectively where there are States, or, in a Territory where no State government exists, there it is reserved to the people. The reservation is as clear and express in one case as in the other. In both, the power of local self-government rests and remains where it was placed by God and Nature, since it was not removed by the Constitution and lodged elsewhere.

The General Government is a political corporation, with powers defined in its charter. Outside of the charter all its acts are void, as would be the similar acts of any other corporation. Suppose the directors of the Illinois Central Railroad Company, out of their pious regard for the moral and spiritual welfare of Chicago, would pass a law to reform the licentiousness, gambling, drunkenness, and other vices there supposed to be practiced, imposing penalties of fines, imprisonment, and disfranchisement upon all prostitutes and keepers of disorderly houses, would anybody be bound by their statutes? Yet their power to pass them and enforce them would be just as good as yours to do the same thing either for Illinois or Utah.

There are other objections to this legislation against Utah. It is not only *unconstitutional*, but *anticonstitutional*. It assumes a power not granted, and then commands it to be enforced by means flatly prohibited. Let me call your special attention to some of them.

I. Trial by jury means by a jury of the country, the peers of the party, selected impartially from the general population, so as to represent a fair average of the public understanding and moral sense. That is the kind of jury that every man is entitled to have who pleads not guilty, and puts himself on God and the country for trial. That is the meaning of the word jury as used in the decrees of Alfred, the



statutes of Edward the Confessor, Magna Charta, the Petition of Rights, the Bill of Rights, and the American Constitution. In that sense it is used by all English-speaking peoples, and with that sense attached to it the institution has been adopted by other nations. The right of trial by jury is withheld by the Edmunds' law or given in a mutilated form, which makes it hardly better than a military commission, "organized to convict."

The body of the population believe, as matter of moral and religious sentiment, that polygamy is at least so far right that a law which makes it a penal offense is unjust and impolitic. The antipopular faction, composing about one twentieth, justify their machinations against the others by expressing a most violent antipathy to that particular feature of the prevailing doctrine which permits of plural marriages.

That is their religion, their politics, their business, their law; they carry it into everything; to them it is piety and patriotism; it stands in the place of faith, hope, and charity; from among them, hardly numerous enough to be called a minority, the act of Congress arranges that the jury shall be exclusively made up; the country, the body of the people, is not to be represented at all.

A juror may be questioned on his oath whether "he believes it right for a man to have more than one living and undivorced wife at the same time, or to live in the practice of cohabiting with more than one woman." If he refuses to answer, or answers in the affirmative, he is conclusively presumed to be one of the people, and must be rejected; but if he replies "No," he has spoken the watchword of the inimical faction, and he is admitted, because his ascertained hostility to the party accused, and all his class, may be relied upon as an element of his verdict.

All officers concerned in a trial under this law are required to sift out the panel, and see that no one gets on who will not jump at every chance of conviction. The summoning-clerk must be what is called in Philadelphia a "jury-fixer"; your judges must bring themselves within the old statute against "evil procurers of dozens," that being the designation of certain persons who made it a business and a trade to find twelve men predetermined on a verdict desired by the party who employed them.

An attempt has been made and will be again to justify this unreal mockery of a trial by saying that unless you pack the juries you can not get convictions. As matter of fact this may be true. Generally it is vain to hope that a jury of the country, representing the popular feeling and sense of right, will carry out to its bitter end a law regarded by the mass of the people, whether rightly or wrongly, as unjust, oppressive, and cruel. That is why we have juries. For that reason trial by jury is the great safeguard of civil liberty. To make

them efficient to that end they are judges of the law as well as the facts, and their verdict on both is conclusive. By the exercise of this power they have nullified tyrannical statutes many times. You can not but remember the notable case of Woodfall, when the life of English liberty was saved at its last gasp by the stubborn refusal of the jury to find a verdict according to the law of libel, as laid down by Lord Mansfield. The sentiments of the people were not consulted when you made this law, but you can not evade their judgment upon it when it comes to be executed. They were not represented in Congress, but they must be represented on the jury. The effort now made to substitute a packed jury for a jury of the country is a very poor attempt to defeat the most sacred right which the Constitution guarantees. I solemnly trust that it will turn out as impotent as it is unauthorized.

II. The promoters of the law in question, not satisfied with trying their victims by a court and jury composed of their enemies, concluded to go a little further, and punish them without any trial at all. The frightful penalty of disfranchisement is to be visited upon them without conviction. Men were directed to be stripped of their citizenship, rendered incapable of voting, expelled from offices to which they had been legally chosen, and deprived of all right to participate in the government they lived under, for crimes of which they were never even accused before any legal tribunal. Commissioners are appointed to carry this out, who, reversing the presumption of law, and declaring the whole population to be guilty, proceeded to convict individuals by a test-oath of their own fabrication.

The right to do such things as these does not depend on the jurisdiction of Congress over the Territories. No matter how exclusive your power may be, you can not exercise it in a fashion like that. The Supreme Court decided that the State of Missouri could not put such a provision in her Constitution. It is a bill of pains and penalties, or bill of attainder, which is expressly forbidden by the Constitution. There is no legislative body on this continent that has authority, by an arbitrary decree, to deprive freemen of their civil rights for offenses of which they are not judicially convicted. It is a burning shame that such a decree should be found among the acts of Congress.

If any man thinks that disfranchisement is not punishment, or that the judgment of an election officer is equivalent to a legal conviction, let him read the opinion of the Supreme Court of the United States in Cumming's case (4 Wall.), delivered by Judge Field, or the clear and unanswerable exposition of the subject given by Judge Strong, Huber *vs.* Reily (3 Persifer Smith). If he does not believe on such authority and such reasoning, he would not believe though one rose from the dead.

III. When I first read this law, I did not believe that its support-



ers really wished it to operate upon any but persons who might be legally convicted of offenses *thereafter* committed. The words are capable of that construction, and it is not fair, if it can be avoided, to suppose that a legislator intends to violate the Constitution. But the debates show that I was mistaken upon the matter of fact. The actual intent was to make it *ex post facto*. The commissioners so understood it, and they were subservient enough to carry it out. They gave it a retroactive effect, which reached back for a whole generation, and laid its punitive lash not only on men who were never convicted, but upon men (and women too) who could not be convicted because their offenses were condoned, because they were protected by the statute of limitations, or because they had been already tried and acquitted. Nothing was a defense against this iniquitous act, which suddenly, without warning or trial, reached back like the terrible hind-hand of a gorilla and throttled all that it grasped. An argument certainly can not be necessary to prove that this is an outrage on the Constitution, as well as on the principles of natural justice.

IV. But the pains and penalties of disfranchisement are to be carried still further. By the laws of Utah the right of suffrage belongs to women as well as men. It was bestowed upon them formally and rightfully by the Territorial Legislature, with the consent of the United States, expressed by the Governor, who had an absolute veto. There is no kind of doubt about the right being legally vested. This is so clear and unquestionable that the Federal judges themselves, with every inclination to exclude them from voting, were compelled to decide that it could not be done. Of this acknowledged right it is now proposed to deprive them by a bill of pains and penalties, not grounded upon any pretense of guilt, but coupled with an admission that the suffering parties are perfectly innocent.

It will hardly be pretended that the rights of a woman, when once legally vested, are less sacred than those of a man, or that he more than she is protected by the Constitution against the wrath and malice of political rulers. If the male voters of Utah are free men, the females are free women. One is no more subject to be disfranchised by a bill of pains and penalties than the other. Can either of them be so treated?

The right of suffrage is part of a voter's property. Its value is inestimable, because it is the right preservative of all other rights. You can not deprive him of it without due process of law. You can as well make a legislative decree to take the lands and goods of these men and women in Utah as take the ballot from them. The ballot is especially valuable to them at this moment, as their only weapon of defense against the enemies who are prowling around them to capture their government and use it as an engine to plunder and oppress them. The security, not of their liberties only, but of their peace,

property, and lives, depend upon their being able to keep it. The sin of these otherwise innocent and virtuous women has consisted solely in voting to sustain honest government against the rapacity and fraud which seek to overthrow it.

V. The end and object of this whole system of hostile measures against Utah seems to be the destruction of the popular rule in that Territory. I may be wrong—for I can only reason from the fact that is known to the fact that is not known—but I do not think that the promoters of this legislation care a straw how much or how little the Mormons are married. It is not their wives, but their property; not beauty, but booty—that they are after. I have not much faith in political piety, but I do most devoutly believe in the hunger of political adventurers for spoils of every kind. How else can you account for the struggle they are now making to get possession of all the local offices in the Territory, including the treasurer, auditor, and all depositories of public money? If they do not want to rob the people, why do they reach out their hands for such a grab as this?

If you will look at what is called the Hoar Amendment, consider how it came to be put into the appropriation bill of last session, and reflect upon the nefarious claim which the Governor and his adherents are now making under it to despoil the people of the local offices which they alone have the right to fill, you will be forced to the conclusion that the public liberty of no people has ever before been so shamelessly assaulted. I do not say that the claim is sustained by the law, or that Congress had any intention to authorize the robbery; for I am satisfied of the contrary; but the animus of the anti-popular faction is revealed by the whole transaction in a light that utterly discredits it.

Legally it makes no difference what was the ultimate purpose of those who instigated this political enterprise. But will you, as friends of the Constitution—could you, even if you were its enemies—say that Congress has power to decree the removal of Territorial officers, and direct their places to be filled by others? Even if you could justify the outrage upon the people of removing the agents to whom they have entrusted their money and their business, and forcing upon them others in whom they have no confidence, what right have you to deprive individuals of their property without due process of law? Their offices are property in which, like their goods and lands, they have a legally vested estate. The Hoar Amendment is construed (falsely, I admit) as authorizing all these offices to be seized, and used as a means of forcing the people to maintain their enemies and pay them salaries for any acts of oppression and fraud which they may choose to perpetrate.

Do not charge me with overstating the danger to which the Territory will be exposed if its government shall be captured by those who



are now trying to take it. The experience of the whole world in all time shows that the want of home rule is the want of everything else that is honest and fair. Rulers forced upon a people are never just. It is as certain as the rising of the sun to-morrow that if the people are put under foot they will be trampled down without mercy. And their total destruction will be accomplished very soon. They can not stand what South Carolina did ; there is no "ten years of good stealing" there.

VI. No reasonable man can justify or even excuse such enactments as those proposed in the new bill now pending before you, unless it be assumed that the people of Utah have no rights that a white man is bound to respect.

It appoints a commission to perform the functions of the Legislature and to redistrict the Territory. The apparent purpose of this is to gerrymander the districts so as to give the minority control of the legislative body. With a majority of nearly twenty to one, the commission will find the way to that object so steep and crooked that they scarcely can hope to reach it. But the cunning man who drew this bill inserted a provision that the "existing election districts and apportionments of representation concerning members of the Legislative Assembly are hereby abolished." There can be no election at all for members of the Legislature unless new districts are made by this commission. By simply declining to act it can extinguish the Territorial Legislature altogether. That was the very trick by which the election of the Territorial officers was defeated last August. The Edmunds' bill declared that all registration and election offices should be vacant until they were filled by appointments of certain commissioners. Those commissioners would not make any appointments until after the time for holding the election had passed, and so there was no election. To expect that the same game will not be played over again requires the charity that believeth all things. This bill would put the extinction of the Territorial Legislature into the power of a single member of the commission, for the redistricting is to be done, not by a majority, but by all, and a dissent of one would make the action of the others inoperative.

It would be wearisome to say what might be said about those parts of this bill which authorize a person to be kidnapped and held as a witness who has not been subpoenaed or notified, its subjection of private papers to unreasonable searches and seizures, or the inhuman disregard which it shows of family feeling, and the sanctities of private life, by compelling men and women lawfully married to testify against one another.

VII. These enactments, made and proposed, are in the main a comprehensive bill of pains and penalties, not against persons guilty or supposed to be guilty of polygamy or any other hurtful crime, but

against people known and acknowledged to be innocent. They are intended to disfranchise whole masses of free persons, reduce them to the condition of slaves, and deprive a community of its natural and constitutional right to an honest government of its own. For such a bill there is not only no warrant in the Constitution, but it is expressly interdicted. Nor is there any precedent for it except the Reconstruction Laws of 1867, and they were admitted to be unconstitutional by their author, and by the counsel who undertook to defend them, and to my certain knowledge they would have been declared void by the Supreme Court in the case of *McArdle*, if we had not been circumvented by an act of Congress taking away the jurisdiction. It is true that they were made effectual, but it was done by the Fourteenth Amendment. The opponents of free government in the South, knowing that Congress had no such power, forcibly injected their bill of pains and penalties into the Constitution itself, and there it lies now, side by side with the provision which forbids it. But the injection served only for that occasion; it did not abrogate the prohibition. Bills of pains and penalties are as odious as ever. It is the duty of every public man and every private citizen to hate such things with all his mind and heart and strength, as I hope you do.

Coming back to the original and fundamental proposition, that you have no authority to legislate about marriage in a Territory, you will ask what then are we to do with polygamy? It is a bad thing, and a false religion that allows it. But the people of Utah have as good a right to their false religion as you have to your true one. Then you add that it is not a religious error merely, but a crime which ought to be extirpated by the sword of the civil magistrate. That is also conceded. But those people have a civil government of their own, which is as wrong-headed as their church. Both are free to do evil on this and kindred subjects if they please, and they are neither of them answerable to you. That brings you to the end of your string. You are compelled to treat this offense as you treat others in the States and in the Territories—that is, leave it to be dealt with by the powers that are ordained of God or by God himself, who will in due time become the minister of his own justice.

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## THE SOUTH CAROLINA CASE.

BEFORE THE ELECTORAL COMMISSION.

*Mr. President and Gentlemen:*

I had not, and have not now, any intention to argue this case. I never heard the objections nor knew what they were until they were read in your presence this morning. It would be presumption in me to attempt an argument before a tribunal like this on such a case as this, having had no previous opportunity to consider it, which might put me in a condition better than the judges themselves. You have heard as much of this case and know as much about it as I do.

My idea of the duty which a counselor owes to a court or to any other tribunal, judicial or quasi-judicial, is that he should never open his mouth except for the purpose of assisting the judges in coming to a correct conclusion; and if he is not in a situation to do that he ought to keep silence.

Besides that, I am, I suppose, the very last man in this whole nation who should be called upon to speak here and now. Everybody has suffered more or less by events and proceedings of the recent past, some by wear and tear of conscience, and some by a deep sense of oppression and wrong. But perhaps I, more than most others, have felt the consciousness that I have lost the dignity of an American citizen. I, in common with the rest, am degraded and humiliated. This nation has got her great big foot in a trap. It is vain to struggle for her extrication.

I am so fallen from the proud estate of a free citizen, you have so abjected me, that I am fit for nothing on earth but to represent the poor, defrauded, broken-hearted Democracy. And because I suffer more, they think me more good for nothing than the rest, and conclude to send me out on this forlorn hope, judging, no doubt truly, that it matters not what becomes of me. I ought to go gladly if anything which I can do or say might have the effect of mitigating the horrible calamity with which the country is threatened; a President deriving his title from a shameless swindle, not merely a fraud, but a fraud detected and exposed. I know not how I would feel if called upon to suffer death for my country. I am not the stuff that martyrs are made of, but if my life could redeem this nation from the infamy with which she is clothed, I ought to go to the grave as freely as I ever went to my bed. I see, however, no practical good that I can do, and it is mere weakness to complain.

We have certain objections to the counting of this Hayes vote from South Carolina which look to me insuperable, but I can not hope that they will wear that appearance in other men's eyes. Perhaps the feeling which I, in common with millions of others, entertain on this subject prevents us from seeing this thing in its true light.

But you are wise, you are calm. You can look all through this awful business with a learned spirit: no passionate hatred of this great fraud can cloud your mental vision, or shake the even balance of your judgment. You do not think it any wrong that a nation should be cheated by false election returns. On the contrary, it is rather a blessing which heaven has sent us in this strange disguise. When the omnipotent lie shall be throned and sceptered and crowned you think we ought all of us to fall down and worship it as the hope of our political salvation. You will teach us, and perhaps we will learn (perhaps not), that under such a rule we are better off than if truth had prevailed and justice been triumphant.

Give, then, your cool consideration to these objections, and try them by the standard of the law—I mean the law as it was before the organization of this Commission. I admit that since then a great revolution has taken place in the law. It is not now what it used to be. All our notions of public right and public wrong have suffered a complete *bouleversement*.

The question submitted to you is whether the persons who gave these votes were “duly appointed.” Duly, of course, means according to law. What law? The Constitution of the United States, the acts of Congress passed in pursuance thereof, the Constitution of South Carolina and the authorized acts of her Legislature—these, taken altogether, constitute the law of the case before you.

By these laws the right, duty, and power of appointing electors is given to the people of South Carolina—that is to say, the citizens of the State qualified to vote at general elections. Who are they? By the Constitution of the State, in order to qualify them as voters they must be registered. The registry of a native citizen is a *sine qua non* to his right of voting as much as the naturalization of a foreigner.

Now, the Legislature never passed any law for the registration of voters, and no registration of them was ever made. No doubt has been or can be entertained that the object and purpose of this omission were fraudulent and dishonest: for the Legislature as well as the executive department of that government has been in the hands of the most redemptionless rogues on the face of the earth. But whatever may have been the *motive*, nobody can doubt that the legal *effect* of this omission is to make the election illegal.

That is hardly the worst of it. The election itself, emancipated from all law and all authority, was no better than a riot, a mob, a general saturnalia, in which the soldiers of the United States army cut the principal as well as the decentest figure. We offer to prove—the offer will go upon record, and there it will stand forever—that every poll in Charleston County, where they rushed into the ballot-box 7,000 majority, was in possession of the soldiers.

A Government whose elections are controlled by military force can



not be republican in form or substance. For this I cite the authority of Luther *vs.* Borden, if perchance the old-time law has yet any influence. Do you not see the hideous depth of national degradation into which you will plunge us if you sanctify this mode of making a President? Brush up your historical memory, and think of it for a moment. The man whom you elect in this way is as purely the creature of the military power as Caligula or Domitian, for whom the Prætorian Guards controlled the hustings and counted the votes.

But then we can not get behind the returns, forsooth! Not we!

You will not let us. We can not get behind them. No. That is the law, of course. We may struggle for justice; we may cry for mercy; we may go down on our knees and beg and woo for some little recognition of our rights as American citizens; but we might as well put up our prayers to Jupiter or Mars as bring suit in the court where Rhadamanthus presides. There is not a god on Olympus that would not listen to us with more favor than we shall be heard by our adversaries. We are at their mercy; it is only to them that we can appeal, because you gentlemen unfortunately can not help us. You are bound by the new law which you have made. You are, of course, addicted, like other people, to the vice of consistency, and what is done once must be done over again.

In the Louisiana case the people appointed electors in favor of Tilden, recorded their act, finished it, and left their work in such a state that nobody could misunderstand it. But other persons, who had no power to appoint, falsified the record of the actual appointment, partly by plain forgery and partly by fraud, which was as corrupt in morals and as void in law as any forgery could be. You thought it right and legal and just to say that you would not look at the record which the people had made; the forgery, the fraud, and the corruption were too sacred to be interfered with; the truth must not be allowed to come in conflict with the imposture, lest the concussion might be damaging.

This precedent must be followed. It is new law, to be sure, but we must give it due welcome; and the new lords that it brings into power must be regarded as our "very noble and approved good masters." Having decided that electors were duly appointed in Louisiana who were known not to be appointed, we can not expect you to take notice of any fact similar or kindred to it in South Carolina.

Then, again, the question of "duly appointed" was decided in the case of Levissee, an elector who was an officer of the United States Government at the time he was appointed, and continued to be afterward. The Federal Constitution says that no man shall be appointed

who is in that relation to the Federal Government. But you held, according to law, mind you, that he was a lawful elector, and his vote a good vote. In other words, a thing is perfectly constitutional although it is known to be in the very teeth of a constitutional interdict.

Now you see why we are hopeless. The present state of the law is sadly against us. The friends of honest elections and honest government are in deep despair. We once thought that the verifying power of the two Houses of Congress ought to be brought always into requisition for the purpose of seeing whether the thing that is brought here is a forgery and a fraud on the one hand, or whether it is a genuine and true certificate on the other.

But, while we can not ask you to go back behind this certificate, will you just please to go to it—only to it—not a step behind? If you do you will find that it is no certificate at all such as is required by law. The electors must vote by ballot, and they are required to be on oath before they vote. That certificate does not show that either of these requirements was met, and where a party is exercising a special authority like this they must keep strictly within it, and you are not to presume anything except what appears on the face of their act to be done.

If anybody will cast back his mind a little into the history of presidential elections, or look at the debates of less than a year ago, he will remember that Mr. Jefferson was charged, when he was Vice-President of the United States, with having elected himself by means, not of a fraudulent, but a merely informal vote sent up from Georgia. The informality was not in the certificate inside of the envelope, but outside verification. Mr. Matthew L. Davis, in 1837, got up that story. It was not true, but it was believed for a while, and it cast great odium on Mr. Jefferson's memory. It was not an informality that was nearly as important as this, nothing like it. But one of the Senators now on this bench referred to it in a debate only a short time ago, and denounced Mr. Jefferson as having elected himself by fraud because he did not call the attention of the Senate and House of Representatives to that fact.

If Mr. Jefferson's memory ought to be sent down to posterity covered with infamy because he in his own case allowed a vote to be counted which was slightly informal on the outside of the envelope, I should be glad to know what ought to be done to those who would count this vote, which has neither form nor substance, which leaves out all the essential particulars that they are required to certify.

This great nation still struggles for justice. A million majority of white people send up their cry, and a majority of more than a quarter of a million of all colors demand it. But we can not complain. I



want you to understand that we do not complain. Usually it is said that "the fowler setteth not forth his net in sight of the bird"; but this fowler set the net in sight of the birds that went into it. It is largely our own fault that we were caught.

We are promised—and I hope the promise will be kept—that we shall have a good Government, fraudulent though it be: that the rights of the States shall be respected, and individual liberty be protected. We are promised the same reformation which the Turkish Government is now proposing to its people. The Sultan promises that if he is sustained in his present contest he will establish and act upon certain principles.

First, the work of decentralization shall commence immediately, and the autonomy of the provinces shall be carefully looked after. Secondly, the people shall be governed by their natural judges; they will not send Mohammedans nor Christian renegades from Constantinople down on them, but they shall be governed by people of their own faith. Thirdly, no subordinate officer, when he commits an illegal act, shall be permitted to plead in justification the orders of his superior. How much we need exactly that kind of reform in this country, and how glad we ought to be that our Government is going to be as good hereafter as the Turk's!

They offer us everything now. They denounce negro supremacy and carpet-bag thieves. Their pet policy is for the South to be abandoned. They offer us everything but one; but on that subject their lips are closely sealed. They refuse to say that they will not cheat us hereafter in the elections. If they would only agree to that; if they would only repent of their election frauds, and make restitution of the votes they have stolen, the circle of our felicities would be full.

If this thing stands accepted, and the law you have made for this occasion shall be the law for all occasions, we can never expect such a thing as an honest election again. If you want to know who will be President by a future election, do not inquire how the people of the States are going to vote. You need only to know what kind of scoundrels constitute the returning boards, and how much it will take to buy them.

But I think that even that will end some day. At present you have us down and under your feet. Never had you a better right to rejoice. Well may you say: "We have made a covenant with death, and with hell are we at agreement; when the overflowing scourge shall pass through, it shall not come unto us; for we have made lies our refuge, and under falsehood have we hid ourselves." But, nevertheless, wait a little while. The waters of truth will rise gradually, and slowly but surely, and then look out for the overflowing scourge. "The refuge of lies shall be swept away, and the hiding-place of falsehood shall be uncovered." This mighty and puissant nation will yet

rouse herself up like a strong man after sleep, and shake her invincible locks in a fashion you little think of now. Wait : retribution will come in due time. Justice travels with a leaden heel, but strikes with an iron hand. God's mill grinds slow, but dreadfully fine. Wait till the flood-gate is lifted, and a full head of water comes rushing on. Wait and you will see fine grinding then.

**THE END.**



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